UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/513
22 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 513

Case No. 538: BARABAS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Samar Sen; Mr. Luis de Posadas Montero;

Whereas, at the request of Frank Barabas, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 29 December 1989 and 30 January 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 January 1990, the Applicant filed an application, containing the following pleas:

"II. Pleas

10. The Applicant respectfully requests the Administrative Tribunal to make the following findings as well as to take the following decision:

(a) To find that the Joint Appeals Board erred when it decided that the Applicant's appeal did not fall within its competence;

(b) To find that the first round of the 1988-89 Professional selection process in the Department of Public Information was seriously flawed and that these flaws, although subsequently recognized by the Administration, were not retroactively corrected, thus resulting in a continuation of injury to the Applicant;

(c) To find that inadequate consideration was given to the Applicant's eligibility for posts at a higher level and that there was a failure to apply to the Applicant the normal criteria for promotion as a result of the 1988-1989 Professional selection process in the Department of Public Information, in so far as that process operated outside of and in contradiction to the normal promotion process provided for in the Staff Rules;

(d) To decide that, in view of the above, the Applicant should be paid an amount equal to two years of his net base salary, this amount being payable also in the event that the Administrative Tribunal should decide to remand the case back to the Joint Appeals Board."

Whereas the Respondent filed his answer on 26 February 1991;

Whereas the Applicant filed written observations on 30 April 1991;

Whereas, on 15 May 1991, the Tribunal put questions to the Respondent and on 16 May 1991, the Respondent provided answers thereto;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 20 September 1955, as a Clerk at the G-2 level, on a short-term appointment for the duration of the Tenth Session of the General Assembly. On 16 February 1956, he was re-employed as a File Service Clerk for one month, that appointment being converted to a probationary one on 16 March 1956. He resigned on 8 June 1956, having been called to serve in the U.S. Armed Forces. On 5 November 1956, the Applicant was re-employed as a Clerk-Typist at the G-2 level, on another short-term contract for the duration of the Eleventh Session of the General Assembly. On 22 March 1957, he received a three-month fixed-term appointment as a Documents Clerk. His appointment was converted to a probationary one on 1 May 1957, and on 1 January 1959 he received a permanent appointment. Effective 1 January 1963, the Applicant was promoted to the G-4 level. Effective 1 August 1965, he was promoted to the Professional Category at the P-1 level, with the functional title of Assistant Information Officer. On 1 August 1967, he was promoted to Associate Information Officer (Reporter/Writer) at the P-2 level. On 1 June 1970, he became an Information Officer (Reporter/Writer) at the P-3 level, and on 1 April 1973, he was promoted to the P-4 level and designated "Editor".

The Applicant was promoted to the P-5 level on 1 April 1980, with the functional title of Senior Information Officer (Senior Press Officer). On 1 May 1981, he was reassigned within the Division and made Editor-in-Chief of the Yearbook Section. He became Chief of Section on 9 March 1983. Since 10 March 1986, he has been a Senior Information Officer in the Press and Publications Division, Office of the Director, Department of Public Information (DPI).

At its Fortieth Session, in 1985, the General Assembly, by its resolution 40/237, decided to "establish a Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations" (the Group of 18). In its report to the General Assembly dated 15 August 1986 (A/41/49, GAOR 41st Session, Supplement No. 49 (1986)), the Group of 18 recommended that: "A thorough review of the functions and working methods as well as of the policies of the Department of Public Information should be conducted, with a view to bringing its role and policies up to date in order to improve the capacity and ability of the Department to provide information on United Nations activities ..." (Recommendation 37(1)). The General Assembly approved this recommendation in its resolution 41/213 of 19 December 1986 and directed the Secretary-General to carry out the reform. In implementing the General Assembly's decision, the Secretary-General also had to take into account Recommendation No. 15 of the Group of 18, concerning the reduction of 15 per cent of "the overall number of regular budget posts" within a period of three years, "particularly in the higher echelons".

During the first quarter of 1987, the Secretary-General appointed a new Under-Secretary-General to head the Department of Public Information. On 23 October 1987, a document entitled "A Plan to Revitalize the Department of Public Information" was submitted to the staff of DPI. On 2 November 1987, the Secretary-General announced to the staff in ST/SGB/Organization/DPI the new organization and functions of the Department.

In a memorandum dated 8 April 1988, the Under-Secretary-General for DPI announced to DPI staff in the Professional levels and above, the procedures to be followed for the selection of staff to fill Headquarters posts at the Professional levels and above under the new staffing table for the Department, which was attached to the memorandum. She stated that the procedures for the reorganization had been approved jointly by the Assistant

Secretary-General, Office of Human Resources Management (OHRM), and herself, following discussions with staff representatives of both Departments, including DPI. In essence, there would be "three rounds of internal DPI advertising for posts at the P-2/1 through P-4 levels, for which only qualified DPI staff [could] apply, and of Secretariat-wide advertising for posts at the P-5 and D-1 levels". The advertising and selection process would commence forthwith.

Also on 8 April 1988, the Director, Committee Liaison and Administrative Services, DPI, informed the Applicant that the post he was currently encumbering was to be discontinued under the revised staffing table. In order to be considered for posts under the revised staffing table, he was required to apply for posts to be advertised. In the first round of the selection process, the Applicant applied for two D-1 posts.

In a memorandum dated 26 August 1988, the Under-Secretary-General for DPI announced the names of staff selected to fill posts circulated in the first round of the staff selection process. The Applicant was not selected for the two D-1 posts for which he had applied, nor was he selected for any other post.

On 2 September 1988, the Applicant, together with six other DPI staff members, requested the Secretary-General to review the administrative decision announcing the results of the first round of the selection process as well as to stay administrative action pending a review. On 14 September 1988, the President of the Staff Committee wrote to the Under-Secretary-General for DPI to express her concern about possible departures from the principle that priority should be given to lateral assignments of staff in the first round of the selection process.

On 28 September 1988, the Assistant Secretary-General, OHRM, informed the Applicant and the other six DPI staff members who had requested review of the decision, that only the first phase of a three-stage selection process had been concluded and that "[t]he two forthcoming rounds of selection for posts at Headquarters together with available UNIC [United Nations Information Centre] posts should provide ample opportunity for the Department to address the concerns [they] raised in [their] letter to the Secretary-General". He further noted that he had requested the Under-Secretary-General for DPI to place "primary emphasis on the lateral

redeployment of staff" and that "the implementation of those decisions which entail promotion to the P-5 level be deferred until phases 2 and 3 of the selection process have been completed, since further adjustments or shifts may be called for at that stage". On 4 October 1988, the Under-Secretary-General for Administration and Management informed the Applicant and the other six DPI staff members of his decision that "it will be in the interest of the Organization and of good administration, that the selection process should move into phases 2 and 3", and that at the end of those phases "a general review of staff, particularly those at the P-5 level, will be undertaken to ensure optimum placement".

On 28 October 1988, the Applicant filed a preliminary statement of appeal with the Joint Appeals Board (JAB) and, on 1 December 1988, he submitted a full statement of appeal against the administrative action of 26 August 1988, announcing the results of the first phase of the selection process, and further requesting that implementation of the administrative decision to move the selection process into phases 2 and 3 be suspended.

The second phase of the selection process was initiated on 8 November 1988, with the circulation of a list of the posts to be filled in that phase. The Applicant did not apply for any of the posts listed. The results of the second round were announced on 8 March 1989. The Applicant was not included among those staff who were selected as a result of the second phase of the selection process. The third phase of the selection process was initiated on 5 May 1989.

The JAB adopted its report on 27 June 1989. Its considerations, conclusion and recommendation read as follows:

> "Considerations
>
> 46. The Panel was asked to consider the appellant's allegation that his 'contractual rights' had been violated through the use of an improper staff selection process applied in connection with the restructuring of DPI.
>
> 47. The Panel noted that the selection process in question was to be effectuated in three rounds, the first of which had already been completed at the time this appeal was filed, and the second and third of which had not yet been finalized (as of this moment, the second round has been completed).

48. The Panel also noted the appellant continues to serve at his previous level.

49. The Panel observed that under staff regulation 11.1, staff members may appeal 'against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules...'.

50. Based upon the foregoing, the Panel was of the view that the appellant in the present case failed to identify any specific injury which would be appealable under Chapter XI of the Staff Rules. It appeared to the Panel that since the selection process has not yet been completed, the appellant's allegation of injury was premature. In fact, the Panel noted that at this stage it was impossible to determine whether or not the selection process would result in any injury to the appellant.

51. Accordingly, the Panel felt that it was not competent to consider the merits of the case at this point in time, without prejudice to any decision by the Joint Appeals Board to do so at a later stage when and if the appellant is able to demonstrate that his terms of appointment have been affected.

Conclusion and Recommendation

52. The Panel decides that the present case does not fall within its competence and, accordingly, makes no recommendation in support of the appeal."

On 8 August 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had taken note of the Board's conclusion and decision that it was not competent to entertain the appeal.

Also on 8 August 1989, the Under-Secretary-General, DPI, announced to the staff of DPI the results of the third round of the selection process. The Applicant, effective 1 January 1990, was not included among those selected.

On 22 December 1989, the Under-Secretary-General, DPI, assigned the Applicant, effective 1 January 1990, to an extra-budgetary post at the P-5 level with responsibility for a publication entitled "World Statesman". The Applicant declined the assignment and informed the Under-Secretary-General, DPI, of his wish to continue working in the area of computerization of DPI, as it would be in that area that he could, in his judgement, contribute more

effectively to DPI's work. The Applicant subsequently continued working in the area of his expressed preference, i.e., in the area of DPI's computerization, in the Office of the Under-Secretary-General, DPI.

On 30 January 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB erred in deciding that the Applicant's appeal did not fall within its competence.

2. The first phase of the selection process was seriously flawed and these flaws, although subsequently acknowledged by the Respondent, were not corrected retroactively, resulting in a continuation of injury to the Applicant.

3. The selection process in DPI operated outside of and in contravention of the promotion process provided for in the Staff Rules.

Whereas the Respondent's principal contentions are:

1. The right to appeal under the Staff Regulations and Rules is granted to staff in case of alleged non-observance of the staff member's terms of appointment arising from a final decision of the Secretary-General. Staff have no right of appeal unless their terms of appointment are violated.

2. The implementation of the DPI restructuring did not violate the Applicant's rights.

3. The Applicant received full and fair consideration for the posts for which he had applied.

The Tribunal, having deliberated from 15 to 22 May 1991, now pronounces the following judgement:

I. The Tribunal notes that this case is substantively identical to that submitted earlier by a colleague of the Applicant, in respect of whom the Tribunal issued its Judgement No. 511 (Parker) at its last session. Consequently, our conclusions are the same.

II. The Applicant essentially contends that the procedures and decisions taken by the Department of Public Information (DPI) in connection with a reorganization of its structure and functions eroded or violated contractual and other rights as defined in the Staff Regulations and Rules or as deduced from established practice. The Respondent's contention is that everything that the Applicant complains of was done under the authority of the General Assembly and through the legitimate exercise of the Secretary-General's discretionary powers. The JAB, which reviewed the Applicant's complaint in June 1989, considered that, as argued by the Respondent, since only the first phase of the staff reorganization had been undertaken and two more phases were still to come, no specific injury to the Applicant could be identified at that time. The JAB considered that "the appellant's allegation of injury was premature. In fact, the Panel noted that at this stage it was impossible to determine whether or not the selection process would result in any injury to the appellant" (emphasis added). Thus, the JAB itself kept the door open for further consideration and examination and indeed stated specifically in its considerations that the complaint was premature, "without prejudice to any decision by the Joint Appeals Board" to consider the merits of the case "at a later stage". Since the JAB did not reach the question of injury to the Applicant from the administrative decisions which were taken, the Tribunal is unable to deal with that issue at present. However, if there had been improper action which reduced the number of posts potentially available for the Applicant, that might have established injury to the Applicant sufficient to warrant consideration of the merits by the JAB.

III. After the JAB adopted its report on 27 June 1989, two more rounds of selection were undertaken and the process of restructuring DPI was apparently completed. The application to the Tribunal indicates that the issues raised by the Applicant and rejected by the Respondent still need further examination. In particular, the JAB may wish to analyse whether the various administrative measures (eg. action taken at different times by the Under-Secretary-General for DPI in connection with the restructuring of the Department and consequent staff deployment) infringed the "contractual

rights" of staff members; whether the discretion of the Secretary-General, undoubtedly of wide application, was properly exercised; and whether in this instance staff members can legitimately claim that their interests have been adversely affected "as a result of unfair or improper procedures, or the injection of extraneous motives in connection with these procedures" (Judgement No. 412, Gross (1988) para. VI).

IV. In view of the above, the Tribunal remands, as it did in the similar Parker case, the case to the JAB for further review of all of the issues raised by the Applicant, and a subsequent decision of the Respondent.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN
Member

Luis de POSADAS MONTERO
Member

Geneva, 22 May 1991

Paul C. SZASZ
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/514
13 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 514

Case No. 486: MANECK

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Ioan Voicu;

Whereas, on 29 August 1988, Arno Maneck, the recipient of a retirement benefit paid by the United Nations Joint Staff Pension Fund (the Pension Fund), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 November 1988, the Applicant, after making the necessary corrections, again filed an application containing the following pleas:

"Plea:

1. The Tribunal may decide that Article 39 (a and b) of the Pension Adjustment System, as approved by the General Assembly in its resolution 42/222 of its 42nd session, contradicts constitutional principles of the United Nations, claiming and establishing equal rights for and equal treatment of all people.

2. The monthly pension of the Applicant of Austrian Schillings(AS) 30,583.13 should be increased to 41,158.82 by applying a 'floor ratio' exchange of AS 17.63 for one US-Dollar (...)."

Whereas, on 20 January 1989, the Applicant filed an addendum to his application, asking the Tribunal to "take note of additional evidence and information and additional legal observations".

Whereas the Respondent filed his answer on 5 October 1990;

Whereas the Applicant filed written observations on 7 December 1990;

Whereas, on 1 May 1991, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant, a former staff member of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and of the United Nations, separated from service on 31 May 1981 and became entitled to a retirement benefit from the Pension Fund, effective 1 June 1981. On 13 July 1981, the Applicant informed the Pension Fund Secretariat that he was a resident of Austria. Consequently, from 1 June 1981, the Applicant's periodic benefit has been calculated and paid in accordance with the provisions of the two-track Pension Adjustment System which entitled him to receive whichever was the higher of: a U.S. dollar pension adjusted according to the U.S. Consumer Price Index (CPI) (subject since 1986 to a 120% "cap") or a pension calculated in Austrian schillings and adjusted in accordance with the Austrian CPI.

In a letter dated 4 December 1986, to the Secretary of the UN Joint Staff Pension Board (the "Secretary of the Board"), the Applicant questioned the methodology utilized to determine the initial amount of his local currrency track pension under the Pension Adjustment System. A lengthy exchange of correspondence on the subject ensued between the Applicant and the Secretary of the Board.

In a letter dated 9 July 1987, the Applicant requested a review by the Standing Committee of the UN Joint Staff Pension Board of his initial local-currency pension, which had been established in accordance with the provisions of the Pension Adjustment System applicable at the time of his separation from service. The Applicant argued essentially that it was inequitable to utilize the 36-month average exchange rate, ending with the month of his separation, to convert his initial dollar pension under the Regulations of the Pension Fund to a local-currency track pension, since a more recent retiree of his acquaintance had received the benefit of a much higher 36-month average exchange rate.

In the final version of his appeal to the Standing Committee, dated 11 April 1988, the Applicant claimed that the interim ("floor") measure introduced into the Pension Adjustment System effective 1 January 1988, for the determination of initial pension amounts on the local-currency track, should be used for the calculation of his pension.

At its 168th meeting, held from 20 to 24 June 1988, the Standing Committee considered the Applicant's appeal of 11 April 1988 and decided to uphold the Secretary of the Board's decision denying the Applicant's request for the re-determination of the local-currency track calculation of his pension. In a letter dated 20 July 1988, the Secretary of the Board informed the Applicant of the Standing Committee's decision.

On 17 November 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's pension entitlement in the local currency of his country of residence (Austrian schillings) should have been calculated in accordance with the provisions of interim emergency measures which went into effect on 1 January 1988, for participants who separated between 1 July 1987 and 31 October 1990 (paras. 38 and 39 of the United Nations Joint Staff Pension Fund Pension Adjustment System).

2. The present calculation of the Applicant's pension, in comparison with corresponding calculations for more recent retirees, violates the principle of equal rights guaranteed by the United Nations Charter and the Universal Declaration of Human Rights.

Whereas the Respondent's principal contentions are:

1. The Applicant's pension entitlement in local currency was determined in accordance with the Regulations and Rules of the Pension Fund and the provisions of the Pension Adjustment System applicable at the time of his separation from service.

2. The interim measures for adopting the floor value of the pensions of certain later retirees are by their terms not applicable to the Applicant, and the General Assembly was justified in so limiting the applicability of these measures.

The Tribunal, having deliberated from 17 to 23 May 1991, now pronounces the following judgement:

I. The Applicant in this case challenges a decision of the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) upholding a decision by the Secretary of the Board to maintain the initial amount of the Applicant's benefit on the Austrian local-currency track, which had been determined in accordance with the provisions of the Pension Adjustment System applicable at the time of his separation from service. There is no dispute that the Applicant has received pension benefits determined in accordance with that System, and in particular paragraph 5(b) thereof. It may be noted that the validity of various aspects of the Pension Adjustment System was recently sustained by the Tribunal in Judgement No. 400, Connolly-Battisti (1987). One of the adjustment features was challenged in that case because it applied to some staff members, but not to others; this feature was upheld by the Tribunal because it was found to have a reasonable basis (see Judgement No. 400, paras. XII-XIV).

II. The Applicant's plea is, in effect, that the amount of his benefit should be determined according to an interim measure for the calculation of the local currency base amounts adopted by the General Assembly on 21 December 1987 and which was made applicable only to the benefits of Pension Fund participants who separated from or died in service during 1987, 1988, 1989 or 1990, with the benefit adjustment payable at the earliest from 1 January 1988. The legal basis asserted by the Applicant for extending this special treatment to him, though he had separated from United Nations service on 31 May 1981 and became entitled to a retirement benefit effective 1 June 1981, is that unless it is applied to him, the interim measure violates constitutional principles of the United Nations establishing equal rights for and equal treatment of all people.

III. In practical terms, the Applicant's dissatisfaction with the amount of his pension benefit stems from the fact that the dollar exchange rate of the Austrian schilling has been on the decline since 1985 and, as a result, the real value of his pension benefit has declined. He points out that

retirees who retired later than he did are in a significantly better position than he because of the manner in which the Austrian schilling exchange rate fluctuated against the U.S. dollar. Hence, he asks that his monthly pension be increased by applying a "floor ratio" exchange of Austrian schilling 17.63 per dollar for re-determining his initial pension.

IV. The jurisdiction of the Tribunal with respect to cases involving the UNJSPB applies to applications alleging non-observance of the Regulations and Rules of the Pension Fund arising out of a decision of the Pension Board. The Tribunal is not empowered to rewrite existing regulations or to create new regulations for the Pension Fund. That is the function of the General Assembly. To the extent that the Applicant seeks such relief from the Tribunal on grounds deemed by him to be equitable in nature, it is plain that his application must fail. The Tribunal likewise has no authority to extend to the Applicant an interim measure adopted by the General Assembly which simply does not apply to him. This again is a matter for the General Assembly's legislative authority.

V. To the extent that the Applicant asserts that the General Assembly acted in violation of the Charter or other human rights principles when it decided to limit the application of the interim measure to participants who separated from service during 1987, 1988, 1989 and 1990, the Applicant's contention is without merit. As explained by the Respondent, the interim measure:

> "was intended to address the problem of declining initial local-currency pensions due to reduced and/or frozen scales of pensionable remuneration for participants in the Professional and higher categories and the declining value of the U.S. dollar against certain currencies, i.e., staying in service longer would yield a lower local-currency pension. However, during the Applicant's service, the scale of pensionable remuneration for such staff was steadily increasing; in his own case, his pensionable remuneration in U.S. dollars increased from US$50,208 on 1 June 1976 to US$78,676 on 1 January 1981." (Emphasis in original)

The General Assembly, therefore, did not act arbitrarily. It had a rational basis for the interim measure. It was aimed at protecting against what it

saw as a wrongful erosion of the economic position of the retired staff members to whom it applied. Thus, a rational basis existed for the manner in which the interim measure was limited. Without question, such action by the General Assembly does not contravene any principle of the Charter.

VI. The Tribunal recalls and reaffirms its decision in Connolly-Battisti in which, inter alia, the Tribunal discussed the role of the General Assembly in developing and making changes in a Pension Adjustment System. The Tribunal pointed out that modifications in the Pension Adjustment System "must not be arbitrary. They must be reasonable and must be adapted to the aim of the system: adjustment of pensions to cost-of-living changes in the various countries of residence of the retired staff members" (para. XI, quoting Judgements No. 378 (XXXI) and No. 379 (XXX)). These quoted words are relevant as a general principle and the General Assembly's action in establishing and limiting the interim measure here at issue is not in conflict with them.

VII. In view of the foregoing, the denial of the Applicant's request for a "floor ratio" similar to that provided in the interim measure did not in any way violate any of the Applicant's rights under any applicable document or principle. Nor did the Applicant receive unequal or unlawful discriminatory treatment in any respect.

VIII. Accordingly, the application is rejected in its entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Ioan VOICU
Member

Geneva, 23 May 1991

Paul C. SZASZ
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/515
27 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 515

Case No. 555: KHAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Arnold Kean;

Whereas, at the request of Mohammed Akbar Khan, a former staff member of the United Nations specifically recruited for the United Nations Children's Fund (UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 20 July 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 May 1990, the Applicant filed an application containing the following pleas:

"II. Pleas

(a) UNICEF Acting Executive Director's decision of dismissal of my service from UNICEF, contained in his letter dated 18 May 1989 (...), be ordered to be withdrawn and I be reinstated in my service in UNICEF from the date of dismissal.

(b) UN Joint Appeals Board's decision to make no recommendations in support of my appeal, contained in their report No. 768, case No. 89-35 dated 9 February 1990, and approved on behalf of the UN Secretary-General (...) by the Acting Under-Secretary-General for Administration and Management on 20 February 1990, be declared as null and void.

(c) The UN Secretary-General's decision to maintain the contested decision, contained in the letter dated 20 February 1990, from the Acting Under-Secretary-General for Administration and Management to me (...) be ordered to be withdrawn.

(d) US$50,000 be ordered to be paid to me by the UNICEF for damaging my reputation within and outside the office and causing financial hardship and mental torches [sic] during the period of dismissal."

Whereas the Respondent filed his answer on 21 December 1990;

Whereas the Applicant filed written observations on 30 April 1991;

Whereas, on 14 May 1991, the Tribunal put questions to the Respondent;

Whereas, on 16 May 1991, the Respondent submitted his answers to the Tribunal's questions;

Whereas, on 20 May 1991, the Applicant commented upon the Respondent's answers of 16 May 1991;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 8 December 1976, as a Steno-Secretary at the GS-4 level in the UNICEF Office in Islamabad, Pakistan. During the course of his employment with the Organization, he was granted a probationary appointment on 1 April 1979 and a permanent appointment on 1 October 1979. In January 1980, he was promoted to the GS-6 level and his functional title was changed to Supply Assistant/ Senior Secretary. He served in this capacity until 22 May 1989, the date of his dismissal for misconduct.

In August 1987, at the request of the Officer-in-Charge of the UNICEF Office in Islamabad, UNICEF's Regional Auditor visited the Islamabad Office to "assess ... the situation of local procurement practices at the Office". The Chief, Supply and Programme Operations Section, had informed the Officer-in-Charge that he suspected UNICEF was being defrauded by submission of tenders by non-existent firms.

In a draft report dated 27 August 1987, to the Officer-in-Charge, Islamabad Office, the Regional Auditor concluded that "there [was] sufficient evidence on hand to warrant both a management decision on staffing and a thorough review of prior procurement activities from the Islamabad Office."

In October 1987, the UNICEF Office in Islamabad hired a consultant to undertake a review of local procurement practices. He conducted his enquiry from 29 October to 10 December 1987, and submitted a report in April 1988, concluding, inter alia, that certain staff had performed their duties either with intent to defraud the Organization and/or with such incompetence or neglect as to be judged equally culpable.

On 18 August 1988, the UNICEF Representative transmitted relevant excerpts of the consultant's report to the Applicant for comments. In a memorandum dated 18 September 1988, the Applicant submitted comments on the consultant's report. The Applicant argued essentially that the investigation had not been carried out "impartially/independently" and that an "attempt [had] been made to prove" that he was "solely responsible for local procurement", absolving the Chief of Section of any responsibility, when in fact, being junior in rank, the Applicant was not supposed to take any action independently from the Chief. The Applicant also submitted detailed comments on all the observations made by the consultant.

On 15 November 1988, the UNICEF Representative established an Ad hoc Advisory Committee on Local Procurement in Pakistan (the Ad hoc Committee) to advise whether there were grounds for attributing to any UNICEF staff involved in the procurement of supplies and equipment in Pakistan, acts of misconduct which could trigger disciplinary procedures or an assessment of performance incompatible with the highest standards of efficiency and competence required by the UN Charter. The Committee was also asked to recommend personnel and management actions to be taken with a view to improving local procurement procedures.

In a report dated 26 November 1988, the Ad hoc Committee found instances of fraud in the bidding process that could not have succeeded unless a staff member within UNICEF had facilitated their execution. As regards the Applicant, the Committee concluded that from a series of "verifiable facts" and from "the pattern of events" described in a number of procurement cases, the Applicant "participated with suppliers to defraud UNICEF by manipulating the bidding process, in such a way that one particular supplier fraudulently wins the bid. The Committee believes that a case of misconduct may be established against Mr. Akbar Khan".

On 27 December 1988, the UNICEF Representative in Islamabad transmitted to the Applicant a copy of the Ad hoc Committee's report. He informed him of the Committee's conclusion that he had participated with suppliers to defraud UNICEF and stated that before reaching any final conclusion, he would consider his comments on the charges pursuant to UNICEF Administrative Instruction 264 of 3 March 1976. Pending the outcome of the disciplinary proceedings, he decided to suspend the Applicant from duty with full pay.

On 15 January 1989, the Applicant submitted his comments on the Ad hoc Committee's report.

On 15 April 1989, the UNICEF Representative submitted his report, dated 20 March 1989, and addressed to the Director, Division of Personnel, concerning the disciplinary proceedings.

On 18 May 1989, the Acting Executive Director of UNICEF informed the Applicant of her decision to dismiss the Applicant for misconduct from UNICEF service, under staff regulation 10.2, on the ground that he had "for personal reasons, facilitated acts of fraud by outside suppliers, resulting in depriving UNICEF of honest and competitive bidding process". He was informed that he would "receive payment of three months in lieu of notice" but no termination indemnity.

On 15 June 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 9 February 1990. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

44. The Panel unanimously

1. Finds that the decision of the UNICEF Executive Director to dismiss the appellant for misconduct for facilitating 'acts of fraud by outside suppliers, resulting in depriving UNICEF of honest and competitive bidding process' was justified on the basis of the available conclusive evidence,

2. Finds that the appellant's procedural rights to due process had been duly observed,

3. Finds that the appellant has produced no convincing evidence that the procedure against

him and the decision by the UNICEF Executive Director had been tainted by prejudice or by some improper motive.

45. Therefore, the Panel unanimously decides to make no recommendation in support of the appeal."

On 20 February 1990, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the decision to dismiss him and to take no further action in the case.

On 19 May 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to dismiss the Applicant was tainted with prejudice and extraneous considerations.

2. The Applicant acted under the direction of the Chief of the UNICEF Supply Section and thus had no authority to sign by himself any documents concerning local procurement.

3. The composition of the Ad hoc Committee was deficient in that it did not include staff representatives in accordance with UNICEF Administrative Instruction 264 of 3 March 1976.

4. Fraud has not been positively proven and if any doubt exists as to the Applicant's participation in fraud it should benefit him.

5. The Applicant was not provided with a copy of the audit report on local procurement and did not have an opportunity to comment thereon.

6. The Applicant was not provided with counsel in the JAB proceeding.

Whereas the Respondent's principal contentions are:

1. The decision to dismiss the Applicant was properly taken and fully respected the Applicant's rights to due process.

2. The decision to dismiss the Applicant was not improperly motivated nor was it tainted by prejudice or other extraneous considerations.

3. The Ad hoc Committee was properly constituted.

The Tribunal, having deliberated from 14 to 27 May 1991, now pronounces the following judgement:

I. The Applicant appeals against the Secretary-General's final decision maintaining the UNICEF Acting Executive Director's decision to dismiss the Applicant under staff regulation 10.2.

The impugned decision results from charges that the Applicant had facilitated acts of fraud by outside suppliers, thus depriving UNICEF of an honest and competitive bidding process. The Respondent determined that such actions by the Applicant constituted serious misconduct unbefitting an international civil servant and warranting dismissal.

II. It is useful to recall here the consistent jurisprudence of the Tribunal pertinent to this case:

1. The Respondent has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct as well as the appropriate disciplinary action.

2. However, the Tribunal is competent to review the Respondent's decision if it is vitiated by lack of due process or by a mistake of fact or law, or is arbitrary or motivated by prejudice or by other extraneous factors.

III. The Applicant contests the Respondent's decision on a number of grounds, which if valid would constitute mistakes of fact, violations of due process or vitiating prejudice or extraneous considerations. The Tribunal will therefore examine each of the Applicant's arguments in this regard.

IV. The Applicant asserts his innocence by denying the fact on which his alleged involvement in the fraud is based and invokes a number of arguments to substantiate his assertion. In particular, the Applicant contends that the decision to dismiss him was based on assumptions, opinions and doubts, but not on proven facts.

V. The Tribunal is unable to accept this contention for two reasons. The first is that the Respondent's accusations against the Applicant were not made lightly or based on an isolated incident of an irregular tender. They were the result of a particular pattern of events spread over almost four years during which the UNICEF Administration engaged in tedious and sometimes frustrating efforts at enquiry, investigation and interviews with the Applicant and others concerned in order to arrive at the truth in a local environment which had its own difficulties.

VI. Secondly, the Tribunal observes that these efforts were made not by one, but by different and separate persons, including:

(a) A Regional Internal Auditor;

(b) An external consultant hired to conduct an inquiry into local processes and procedures;

(c) The members of the Ad hoc Advisory Committee.

The Ad hoc Committee was empowered to advise the UNICEF Representative in Pakistan on whether there were grounds for attributing to any UNICEF staff involved in the procurement of supplies and equipment acts of misconduct or performance which were incompatible with the highest standards of efficiency and competence called for by the UN Charter and the Staff Regulations and Rules. In its report, the Ad hoc Committee stated that it had interviewed all the staff members involved and, after analyzing a number of incidents, concluded as to the Applicant's culpability as follows ...:

> "it is clear ... that he participated with suppliers to defraud UNICEF by manipulating the bidding process, in such a way that one particular supplier fraudulently wins the bid. The Committee believes that a case of misconduct may be established against [the Applicant]."

VII. The Tribunal notes further that on 27 December 1988, the UNICEF Representative in Islamabad transmitted a copy of the report of the Ad hoc Committee to the Applicant, asked for his comments and on 15 January 1989, the Applicant presented a 19-page memorandum replying in detail to that report.

VIII. The Tribunal also notes that four months later, on 18 May 1989, the Acting Executive Director of UNICEF issued her decision to dismiss the Applicant after establishing that the evidence had been carefully assessed in the light of the Applicant's arguments and the conclusion had been reached that the Applicant had participated in the fraud.

IX. In his second argument to prove his innocence, the Applicant contends that he was under the direction and supervision of the Chief, Supply Section, and thus had no authority to sign by himself any documents concerning local procurement.

After consulting the range of assignments undertaken by the Applicant in the course of his service in the Supply Section, especially as reflected in Section II of his Performance Evaluation Report for 1987, the Tribunal notes that he had a substantial level of procurement responsibilities. Therefore, his argument in this regard does not stand.

X. The Applicant also claims he was singled out for disciplinary action while senior responsible officials were exonerated.

The Tribunal cannot accept this argument, because once the responsibility of a staff member for irregularities is duly established, the existence of others who might also be responsible does not relieve the officer of his own responsibility. In its Judgement No. 479, Caine (1990), paragraph III, the Tribunal stated:

> " ... Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them." (Emphasis added)

XI. The Applicant, moreover, attempts to refute the charge against him on the theory that it was necessary for the Respondent first to determine how much money was lost by UNICEF, or the extent of the reduction in the quality of goods it received, as a result of the fraud with which the Applicant was charged. In the Tribunal's view, the Respondent's determination, that the fraudulent manipulation of supply bids by the Applicant is in itself an act

of misconduct warranting dismissal, cannot be reviewed as long as it is within the bounds of the discretionary power recognized by the jurisprudence of the Tribunal.

XII. After reviewing the facts and evaluating the arguments of both parties, the Tribunal concurs with the Joint Appeals Board's (JAB) finding that the decision to dismiss the Applicant was based on conclusive evidence.

XIII. The Tribunal will now examine whether the decision was vitiated by lack of due process, as claimed by the Applicant. He advances several arguments in this regard:

In his first procedural argument, the Applicant claims that he was not provided with a copy of the audit report on local procurement and did not have an opportunity to comment thereon. The Tribunal notes the Respondent's explanation that this report was an initial one, mainly designed to evaluate the situation and to make recommendations to management regarding local procurement practices, and accordingly was not shown to the Applicant.

XIV. On the other hand, the Tribunal notes that the relevant parts of the consultant's report and the entire text of the Ad hoc Committee's report were communicated to the Applicant. He commented on these reports, on 18 September 1988 and 15 January 1989, respectively.

XV. When the Applicant kept complaining that relevant documents were not supplied to him, the Chief, UNICEF Personnel and Administration, Islamabad, in a memorandum of 18 April 1989, invited the Applicant to indicate in writing what other documents he might wish to consult. Moreover, the Applicant was invited to consult the tapes of his several interviews, but failed to avail himself of this opportunity.

XVI. The Tribunal finds that the Respondent did not fail to communicate or offer to the Applicant all the reports and documents that were pertinent to his involvement in the alleged fraudulent acts and were necessary to prepare his defence.

XVII. The Applicant also alleges that his right to due process was violated because the Ad hoc Committee was established without staff participation, contrary to UNICEF Headquarters Administrative Instruction No. 264 of 3 March 1976. According to staff rule 110.1, as applicable at that time, joint disciplinary committees with staff participation were established only at Headquarters and Geneva. For staff members serving at other offices, disciplinary measures could be applied by the Secretary-General without referral to such a joint committee, according to UNICEF Administrative Instruction 264.

As disciplinary committees established in offices away from Headquarters and Geneva did not at the time require staff participation, the composition of the Ad hoc Committee was valid under staff regulation 10.1. Accordingly, the Applicant's argument in this regard fails.

XVIII. The Applicant argues that his right to due process was violated by the JAB, because it did not thoroughly consider his appeal, and as an example alleges that the JAB failed to review or even to mention in its report the Applicant's rebuttal of the Ad hoc Committee's report. The Tribunal notes in this regard that the JAB's work in this case was facilitated by two circumstances:

First, the JAB was faced with a case in which the procedure outlined in UNICEF Administrative Instruction No. 264 had been scrupulously observed.

Second, the JAB had the benefit of reports on two long and extensive enquiries, during which the Applicant was at every stage properly informed and could fully exercise his right to state his case and to have his replies fully considered and evaluated. With regard to the Applicant's complaint concerning his rebuttal of 15 January 1989, the Tribunal finds that the JAB did not ignore this memorandum, the Board expressly mentioned it in paragraph 13 of its report and even quoted from it.

So the Applicant's argument that the JAB was superficial in handling his appeal has no merit.

XIX. The Applicant finally complains that he was denied the assistance of counsel during the proceedings of both the Ad hoc Committee and of the JAB.

XX. With regard to the proceedings of the Ad hoc Committee, the Tribunal notes that UNICEF Administrative Instruction No. 264, paragraph 2(b), provides that during the investigation process, the staff member may avail himself of the advice of another staff member of his choice, present at the same duty station, to assist him in his defence. The Tribunal also notes that when, on 27 December 1988, the UNICEF Representative in Islamabad transmitted a copy of the report of the Ad hoc Committee to the Applicant he was advised that he could avail himself of the assistance of any staff member of UNICEF in Islamabad who was willing to act as his counsel to assist him in preparing his reply. Therefore, it was the responsibility of the Applicant to enlist the services of a colleague of his choice to assist him. The Tribunal does not find in this case any fault in the Respondent's implementation of paragraph 2(b) of Administrative Instruction No. 264.

XXI. With regard to the issue of representation of the Applicant by counsel in the JAB proceedings, the Tribunal notes the following from the correspondence exchanged between the Secretary of the JAB and the Co-ordinator of the Panel of Counsel (the Co-ordinator). The Applicant, on 10 August 1989, requested the help of the Co-ordinator to secure him the services of Counsel. The Secretary of the JAB twice inquired, in December 1989 and January 1990, from the Co-ordinator about the selection of a counsel for the Applicant, since the Secretary intended to place the Applicant's case before the JAB late in January 1990. On 7 February 1990, the Co-ordinator informed the Secretary of the JAB that Mr. Adherata Keefe had agreed to represent the Applicant before the JAB as counsel. On the same day, the Secretary recorded in a Note for the File that the designated counsel had nothing to add and that the Applicant had been advised of the selection of the Counsel. The case thus being ready for submission to the JAB, it met on 8 February 1990, to consider the case.

The Tribunal finds that on that date, the JAB had not been informed by the counsel designated for the Applicant that counsel had not yet contacted his client. The JAB could therefore, in good faith, consider the Applicant's appeal, the written proceedings being complete. In any case, the Tribunal finds no prejudicial error on the part of the Respondent on this point.

XXII. In his observations on the Respondent's answer, counsel for the Applicant argues that there is a serious breach of due process, because

Applicant's application to the Tribunal was drafted without the assistance of counsel. The Tribunal notes that the Applicant was provided with two counsels before he presented his application to the Tribunal on 19 May 1990. Thus on 23 February 1990, the Applicant notified the Co-ordinator of his agreement to be represented by "Mr. B". Moreover, on 4 April 1990, the Applicant was informed by the Co-ordinator that a second counsel, Mr. Fayache, was ready to assist him in his case. Notwithstanding the appointment of these counsels, when the Applicant, on 19 May 1990, filed his appeal before the Tribunal, he noted in response to the question of designation of counsel: "I am myself presenting my case in writing". In these circumstances, the Tribunal finds no breach of due process, especially as Counsel for the Applicant submitted on his behalf observations on the Respondent's answer.

XXIII. The finding of the Tribunal is that the decision to dismiss the Applicant was not vitiated by any lack of due process.

XXIV. After reviewing all the facts, the Tribunal notes further that the Applicant has produced no convincing evidence that the decision to dismiss him had been motivated by prejudice or other extraneous considerations.

XXV. In view of the foregoing, the Tribunal finds that the decision to dismiss the Applicant on the ground of fraud was a valid exercise of the discretionary power of the Secretary-General under staff regulation 10.2, and rejects the application in its entirety.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Arnold KEAN
Member

Geneva, 27 May 1991

Paul C. SZASZ
Acting Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/516
28 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 516

Cases No. 557: SATITE
No. 564: WILLIAMS

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding, Mr. Ahmed Osman, Second Vice-President; Mr. Luis de Posadas Montero;

Whereas, at the request of José Alberto Satite, a staff member of the International Maritime Organization, hereinafter referred to as IMO, the President of the Tribunal, with the agreement of the Respondent, extended to 31 August 1990, the time-limit for the filing of an application to the Tribunal in case No. 557, hereinafter referred to as the "first case";

Whereas, on 6 July 1990, the Applicant in the first case filed an application, containing the following pleas:

"II. PLEAS

The Tribunal is requested:

(a) To rule that the method by which the Applicant's grade, step level and incremental date were calculated on his promotion to the Professional category was not in conformity with the Staff Regulations and Staff Rules of IMO;

(b) To order the Respondent to recalculate the grade, step level and incremental date of the Applicant in the manner determined by the Tribunal in its Judgement No. 451 (Young) and to restore the situation of the Applicant in all

respects to what it would have been if that method of calculation had been applied at the time of his promotion to the Professional category."

Whereas the Respondent filed his answer in the first case on 9 November 1990;

Whereas, on 22 November 1990, Gurpreet Singh Singhota, also a staff member of IMO, applied to intervene in the first case under article 19 of the Rules of the Tribunal, his pleas reading as follows:

"II. PLEAS

1. The Tribunal is requested to allow the application of the Intervener on the following grounds:

(a) ratione personae: the Intervener, as a staff member of the International Maritime Organization, is a person to whom the Tribunal is open under article 2, paragraph 2(a), and article 14 of the Statute of the Tribunal;

(b) ratione materiae: the position of the Intervener is in all relevant respects identical with that of the Applicant in case No. 557; he is therefore entitled to intervene under article 19, paragraph 1, of the Rules of the Tribunal.

2. The Tribunal is further requested to rule that its judgement in case No. 557 shall apply, mutatis mutandis, to the Intervener."

Whereas the Applicant in the first case filed written observations on 19 December 1990;

Whereas, on 10 October 1990, Florence Williams, a staff member of IMO, filed an application in case No. 564, hereinafter referred to as the "second case", containing the following pleas:

"II. PLEAS

The Tribunal is requested:

(a) To rule that, having offered the Applicant promotion to the Professional category with effect from 1 December

1988, the Respondent was bound to make the calculations for the determination of the Applicant's grade, step and incremental date in the Professional category in a manner consistent with the Staff Regulations and Staff Rules in force on the effective date of promotion and that she was entitled to expect that the applicable Staff Regulations and Staff Rules would be followed,

(b) To declare that the method which the Respondent proposed to use for making those calculations was not in conformity with the Staff Regulations and Staff Rules of IMO in force on the said date;

(c) To order the Respondent to give effect to his offer to promote the Applicant to the Professional category, backdated to 1 December 1988, which was accepted by the Applicant, and to calculate her grade, step level and incremental date, for the purpose of her promotion in the manner determined by the Tribunal in its Judgement No. 451 (Young) and to restore the situation of the Applicant in all respects to what it would have been if the backdated promotion, calculated as above, had been made in August 1989, when she wrote to the Secretary-General accepting promotion."

Whereas the Respondent filed his answer in the second case on 15 January 1991;

Whereas the Applicant in the second case filed written observations on 6 February 1991;

Whereas the facts common to the first and second cases and to the intervention are as follows:

IMO's Salary Policy in Promotions is set out in staff rule 103.5. The provision covers promotions within both the Professional category and the General Service category, as well as from the General Service to the Professional category. In June 1988, during the early stages of the Young case (Judgement No. 451), the Secretary-General of IMO amended staff rule 103.5 by adding two new provisions, both specifically relating to promotions of staff from the General Service to the Professional category. New paragraph (iii) specifies that post adjustment shall be taken into account in determining the level of remuneration of a staff member promoted from the General Service to the Professional category. According to paragraph 3(b) of Annex 1 to the IMO Staff Regulations, the definition of "salary" for staff in the Professional category was "net salary" except

"where otherwise provided in these Regulations"; at the request of the Respondent, the IMO Council amended this definition in October 1989, by adding the words "or any staff rule" after "Regulations" in the previous clause.

Whereas the facts particular to the first case are as follows:

The Applicant entered the service of IMO on 17 October 1982. He initially received a one-year fixed-term appointment at the G-7, step IV level, as Supervisor of the Spanish Typing Pool. He was promoted to the G-8 level, with effect from 1 July 1983. His appointment was extended for a further one-year period and, on 16 August 1984, he was offered a regular appointment.

Effective 1 September 1988, the Applicant's post was reclassified to the P-1 level. In a memorandum dated 21 February 1989, the Head, Personnel Section, informed the Applicant of the "likely impact of [his] accepting promotion from G-8 to P-1". He attached two tables with calculations based on the recently amended text of staff rule 103.5(iii), showing the financial implications of accepting a promotion on 1 September 1988 and on 1 December 1988 (i.e. before and after an increase in General Service salary rates). He also noted that: "A far more difficult situation arises with respect to pensions and it is for individual staff members to weigh the advantages on the salary side against possible disadvantages on the pension side". He set out figures which showed that the pensionable remuneration for the grade to which he would be promoted (P-1) would be lower than the pensionable remuneration at his current General Service step, and stated: "You would thus remain at the dollar equivalent GS [General Service] level pension remuneration until such time as you overtook it in the Professional category either as a consequence of general adjustments to that remuneration or by moving yourself on the scale."

The Applicant accepted the offer of promotion with effect from 1 December 1988 and was promoted. A Personnel Action Form dated 17 May 1989 was issued to implement the promotion.

On 15 June 1989, the Applicant wrote to the Respondent, attaching a copy of the Personnel Action Form implementing his promotion. He stated that: "The calculations ... and the figures on the form itself indicate that

'salary' for the purpose of calculating the increase was taken as net salary plus post adjustment" whereas paragraph 3(b) of Annex 1 to the Staff Regulations provided that "salary" was to mean net salary. He accordingly requested the Respondent to review the decision concerning the level of his remuneration on promotion to the Professional category and to revise the calculation so as to conform with the definition of salary in Annex 1 to the Staff Regulations.

By a memorandum dated 13 July 1989, the Director, Administrative Division, informed the Applicant that the Respondent had reviewed the decision concerning the level of his remuneration on promotion to the Professional category and had decided that the calculations on the Personnel Action Form dated 17 May 1989 should stand. On 3 August 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 1 February 1990. Its recommendation reads as follows:

"4. Recommendation

4.1 However, having reached the above conclusions, the Board does not feel competent to pronounce itself as to whether the Secretary-General is empowered in legal terms to introduce in Rule 103.5(iii) a departure from the definition of 'salary' in the Regulations without prior 'explicit' approval by the Council of a suitably amended Regulation.

4.2 Bearing in mind the overall intent and purpose of the rule and the possible ill feeling among other members of the staff should the 'letter' of the regulation be applied, the Board recommends that, in the best interests of the Organization, the Administrative Division should:

1. Have further talks with the Appellant aimed at reaching an equitable compromise solution which would take account of his accrued expectations and;

2. Review its administrative decision accordingly.

4.3 The Board further recommends that the definition of 'salary' in the Staff Regulations be deleted and that the text of Rule 103.5 be suitably restructured to clarify its meaning and avoid future misinterpretations."

On 27 February 1990, the Head, Personnel Section, transmitted to the Applicant a copy of the Board's report and informed him of the Respondent's decision in respect of the Board's findings as follows:

"1. He notes the Board's recommendation in paragraph 4.1;

2. He does not accept the recommendation in paragraph 4.2; and

3. He accepts the recommendation in paragraph 4.3 subject to a full review of the implications of the removal of the definition on other Regulations and Rules."

On 6 July 1990, the Applicant in the first case filed with the Tribunal the application referred to earlier.

Whereas the facts particular to the intervention are as follows:

The Intervener entered the service of IMO on 29 June 1987. He initially received a one-year fixed-term appointment at the G-8, step I level, as Programme Officer. On 1 October 1988, he was granted a permanent appointment at the P-1, step I level. On 1 November 1989, he was promoted to the P-2, step I level, and on 1 November 1990, his step level was increased to II.

On 22 November 1990, the Intervener filed with the Tribunal the intervention in the first case referred to earlier.

Whereas the facts particular to the second case are as follows:

The Applicant entered the service of IMO on 26 January 1978. She initially received a three-month fixed-term appointment as a Senior Secretary at the G-5, step IV level, which was converted to a probationary appointment on 1 May 1978 and to a regular appointment on 9 March 1979. During the course of her employment with IMO, the Applicant was promoted to the G-6 level with effect from 1 April 1982, and to the G-7 level with effect from 1 September 1985, when she was appointed Supervisor of the English Pool, Conference Division. On 1 March 1986, the Applicant was promoted to the G-8 level.

Effective 1 September 1988, the Applicant's post was reclassified to the P-1 level. In a memorandum dated 21 February 1989, the Head, Personnel Section, informed the Applicant of the "likely impact of [her] accepting promotion from G-8 to P-1". He attached two tables with calculations based on the recently amended text of staff rule 103.5(iii) showing the financial implications of accepting a promotion on 1 September 1988 and on 1 December 1988. He also noted that: "A far more difficult situation arises with respect to pensions and it is for individual staff members to weigh the advantages on the salary side against possible disadvantages on the pension side". He set out figures which showed that the pensionable remuneration for the grade to which she would be promoted (P-1) would be lower than the pensionable remuneration at her current General Service step, and stated: "You would thus remain at the dollar equivalent GS [General Service] level pension remuneration until such time as you overtook it in the Professional category either as a consequence of general adjustments to that remuneration or by moving yourself on the scale."

On 9 August 1989, the Applicant wrote to the Respondent concerning the offer of promotion. She stated that the relevant calculations of the salary which would take effect from either 1 September 1988 or 1 December 1988 "were disappointing in that the salary offered in the new Professional grade gave hardly any increase in take-home pay and did not offer any benefit with regard to pensionable remuneration because ... [she] would not have sufficient time before retirement to reach the present pensionable remuneration in the new Professional grade and surpass it". She stated that she had held several discussions on the subject with the Director, Administrative Division, as well as with her Director and had proposed that she be upgraded "to the requisite Professional grade to make the promotion worthwhile and then, after [her] retirement ..., the successor would resume the grade of the post." This would have the effect of giving her a salary in the Professional category higher than the General Service salary she was then receiving and would not put her pensionable remuneration at a disadvantage. The Director, Administrative Division, had rejected her proposal on the grounds that it would cause an unacceptable precedent in the Organization.

In a reply dated 6 September 1989, the Director, Administrative Division, informed the Applicant that the Respondent had considered her request and that while there was "no difficulty with the effective date of [her] promotion being established at 1 December 1988, the grade and step in the Professional category would be determined by staff rule 103.5(iii)". He concluded: "In other words, [the Respondent] does not share your view that staff rule 103.5, as recently amended, cannot be implemented because of the definition of 'salary' in the Staff Regulations."

The Applicant chose not to be promoted to the Professional category.

On 19 September 1989, the Applicant requested the Respondent to review his decision concerning the methodology applied in calculating her salary on promotion. Having received no reply, on 24 October 1989, the Applicant lodged an appeal with the JAB. The Board adopted its report on 31 August 1990. Its recommendation reads identically to that quoted above in respect of the first case.

On 12 September 1990, the Head, Personnel Section, transmitted to the Applicant a copy of the Board's report and informed her of the Respondent's decision in respect of the Board's findings, which was identical to the decision of 27 February 1990, quoted above in respect of the first case.

On 10 October 1990, the Applicant in the second case filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Respondent acted improperly in adding a paragraph (iii) to staff rule 103.5, which addition was inconsistent with the definition of "salary" in the Staff Regulations.

2. The Respondent violated the Staff Regulations and the principle established by the Administrative Tribunal in Judgement No. 451, Young by applying staff rule 103.5(iii) to the Applicant in the first case, on his promotion, and by notifying the Applicant in the second case, of the proposed application of this rule to her should she accept promotion.

Whereas the Respondent's principal contention is:

There is nothing incompatible between staff rule 103.5(iii) and the definition of the term "salary" for Professional staff which was in effect

at the time of the promotion of the Applicant in the first case and the offer of a promotion to the Applicant in the second case. The Rule was consistent with the Staff Regulations and Rules of IMO, and the Respondent acted lawfully by applying the Rule and in indicating it would be applied.

Whereas the Intervener's principal contention is that his situation is substantively identical to that of the Applicant in the first case and therefore the latter's contentions are also applicable to the Intervener.

The Tribunal, having deliberated from 8 to 28 May 1991, now pronounces the following judgement:

I. The issue in these two cases is essentially the same and, therefore, the Tribunal will consider them together. In both cases the staff members, originally in the General Service category, were offered promotion to the Professional category. Upon receiving the offer, they were duly informed of staff rule 103.5, which provided the system for establishing their respective salary levels and steps-in-grade in passing from one category to the other. Both staff members were of the opinion that the system was erroneous since it was based on a staff rule that they viewed as lacking any legal force.

II. Faced with this situation, the Applicant Williams declined the offer of a promotion whereas the Applicant Satite accepted it, both subsequently challenging the validity of the rule relied on by the Respondent.

III. The contention of both Applicants is that the judgement of the Tribunal in Young (Judgement No. 451) specifies the way in which the remuneration in the Professional category should be fixed in connection with a promotion from the General Service category, and that the Respondent must abide by that ruling. The Respondent claims that the situation had changed since the judgement in Young by the introduction of a new staff rule providing for a different system governing promotions from the General Service to the Professional category. The Applicants, on their side, claim that such new rule is not valid and that the old system should continue to be applied.

IV. The issue before the Tribunal is therefore the validity of the staff rule relied on by the Respondent in respect to the Applicants' promotions. The provision in question is paragraph (iii) of staff rule 103.5, which reads as follows:

> "On promotion of a staff member from the General Service category to the Professional category, the staff member's step in the Professional level and the date of his or her next salary increment shall be determined in such a way that the total of the new net base salary plus the appropriate post adjustment at the single rate shall, during the first year following promotion, exceed the salary which the staff member received in the General Service category by the amount of one step in the new salary level, including the non-resident's allowance, if applicable,"

This rule was approved, as all staff rules are, on the sole authority of the Respondent, the Secretary-General of IMO, and subsequently communicated to the Council of the Organization, which took note of it in due course.

V. The Applicants submit that the Respondent had no power to approve such a rule because its wording contradicts that of paragraph 3(b) of Annex 1 to the Staff Regulations, as interpreted by the Tribunal in the Young case. The Applicants' view is that, as staff regulations are norms of a higher level since they have to be approved by the Council of the Organization, they cannot be modified by staff rules which are of a lower level and only require approval by the Secretary-General. Nor, for the same reason, according to the Applicants, can staff rules contradict the provisions of staff regulations in any way. It is the Applicants' contention that the expression "salary" used in paragraph 3(b) of Annex 1 to the Staff Regulations, and interpreted as indicated by the Tribunal in the Young case, should continue to be applied in promotions from the General Service to the Professional category, therefore, in their view, the insertion of a new paragraph in staff rule 103.5 should be disregarded as being illegal inasmuch as the Respondent had no power to alter, on his own authority, a norm of a higher level.

VI. The Tribunal firmly upholds the principle of the hierarchy of norms and, therefore, a norm of inferior level could not lawfully contradict one of a higher level.

VII. Bearing in mind this principle, the Tribunal in the present instance finds that paragraph (iii) of staff rule 103.5 in no way contradicted paragraph 3(b) of Annex 1 to the Staff Regulations, as it read at the time in question. It also finds that the Respondent acted within the limits of his competence when he added paragraph (iii) to staff rule 103.5. Nor is the Tribunal able to find in the paragraph any inconsistency with its judgement in the Young case.

VIII. On the contrary, the Tribunal considers that paragraph (iii) of staff rule 103.5 shows that the Respondent has completely accepted the Tribunal's view that:

> "Since the Staff Regulations nowhere provide for a different meaning of 'salary' in the case of promotion from the General Service to the Professional category and since there is nothing in Staff Rule 103.5 or elsewhere in the Staff Rules which supplements that meaning with any additional element, it seems obvious that this is indeed the meaning of 'salary' for purposes of promotion from the General Service to the Professional category". (Emphasis added) (Judgement No. 451, Young, paragraph III)

The conclusion reached by the Tribunal in the Young case was therefore based largely on the fact that the meaning of the word "salary" in the Staff Regulations was not supplemented, as it might have been, by a clarification embodied in the Staff Rules and, furthermore, that the exact sense of the word "salary" could (and should) be fixed by a provision in the Staff Rules.

IX. Subsequently, this was done through the inclusion of paragraph (iii) in staff rule 103.5. It is the Tribunal's opinion that there is no ground to challenge the authority of the Respondent to develop and clarify the provisions of a staff regulation, as long as such an exercise is consistent with that regulation.

X. In this instance, the word "salary" is taken in the same sense as in paragraph 3(b) of Annex 1 to the Staff Regulations, i.e. as net salary, the only change being that, alongside "salary" so defined, paragraph (iii) of staff rule 103.5 requires that post adjustment be taken into consideration in determining the new situation of any staff member who is promoted from the General Service to the Professional category. The inclusion of the words "post adjustment" after "salary" in no way alters the meaning of "salary", as defined by paragraph 3(b) of Annex 1 to the Staff Regulations.

XI. The Applicants also challenge the validity of paragraph (iii) by claiming that the addition of this paragraph to staff rule 103.5 was due to the fact that the Respondent wished to avoid the consequences of extending to other staff members the system used in Young following the Tribunal's judgement. The Tribunal finds no fault in this. The Respondent should always be free to correct, through the normal legal channels, any existing situation calling for correction. In fact, in Young, the Tribunal specifically pointed out such a possibility.

XII. Finally, the Applicants find the confirmation of their assertion that the Respondent had exceeded his authority when approving paragraph (iii) of staff rule 103.5, in the fact that the Respondent subsequently proposed a modification to paragraph 3(b) of Annex 1 to the Staff Regulations explicitly permitting the meaning of "salary" to be defined either through a staff regulation or a staff rule. It is the contention of the Applicants that, since the Respondent felt it necessary to propose such a modification, it is to be concluded that, before the modification was approved in 1989, the definition of the term "salary" was exclusively subject to the the Staff Regulations. The Tribunal finds this argument irrelevant. As shown supra, the term "salary" in paragraph (iii) of staff rule 103.5 is used in compliance with the relevant staff regulation in force at the time, i.e. it is used as meaning "net salary". The mere fact that the phrase "plus the appropriate post adjustment" follows, shows that "salary" was taken in the sense defined by paragraph 3(b) of Annex 1 to the Staff Regulations. Therefore, the argument whether, before the modification of the staff regulations proposed by the Respondent, it was or was not possible to define the term "salary" through a staff rule has no bearing on this case.

XIII. For the foregoing reasons, the applications by Mr. Satite and Miss Williams are rejected in their entirety.

XIV. Subsequent to deciding on its Judgement in case No. 557, the Tribunal, having considered Mr. Singhota's request for intervention, finds that, as a consequence of that decision, the request for intervention has been rendered moot.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Ahmed OSMAN
Second Vice-President

Luis de POSADAS MONTERO
Member

Geneva, 28 May 1991

Paul C. SZASZ
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/517
29 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 517

Case No. 551: VAN BRANTEGHEM

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas, in Judgement No. 439, rendered by the Tribunal on 17 May 1989, in favour of the Applicant Ronny Paul Van Branteghem, a former staff member of the United Nations Development Programme (UNDP), the Tribunal ordered the Respondent to "bear the return travel expenses of the Applicant and his family members and ... cease to withhold the equivalent amount from sums otherwise due to the Applicant".

Whereas, on 2 August 1989, the Chief, Accounts Section, Division of Finance, UNDP, informed the Applicant that the UNDP Administration had processed his final payments and that, in doing so, it had deducted from his separation payments the amount of $1,740 representing the "cost of shipment of personal effects in excess of entitlements", from his previous duty station, Bangkok, to his new duty station, Khartoum, in September 1985.

A lengthy correspondence ensued between the Applicant, the UNDP Administration and the Executive Secretary of the Tribunal concerning the deduction of $1,740 from the Applicant's final payment and the implementation of Judgement No. 439. The Applicant argued essentially that the deduction of $1,740 from his final payment should not have been made, as the Administration had approved the conversion, from surface to air transport on a one to one basis, of a split shipment of his personal effects from Bangkok to Khartoum.

On 27 April 1990, the Chief, Payroll Unit, Disbursement Section, Accounts Division, Office of Programme Planning, Budget and Finance, United Nations, forwarded to the Applicant a check in the amount of $338.14 representing the net of his entitlements and a copy of his final pay statement with a note attached thereto explaining how UNDP had calculated that amount.

On 28 April 1990, the Applicant filed an application containing the following pleas:

> "PLEAS
>
> The Applicant respectfully requests the Tribunal to enforce the Judgement No. 439 dated 17 May 1989, whereby the Respondent was ordered by the Tribunal to quote cease to withhold the equivalent [amount from] sums otherwise due to the Applicant unquote;
>
> The Applicant further requests the Tribunal to find that the delays in implementing the above mentioned Judgement No. 439 constitute an obstruction of justice which has brought financial disadvantage to the Applicant;
>
> The Applicant requests the Tribunal to award an indemnization of US$5,000 to the Applicant for moral and financial injuries sustained by the Applicant as a consequence of the unreasonable delays in the implementation of the Tribunal's Judgement No. 439."

On 15 June 1990, the Applicant responded to the Chief, Payroll Unit, complaining about the deduction of $1,740 from his final entitlements. On the same day the Applicant copied this communication, with attachments, to the Executive Secretary of the Tribunal.

Whereas the Respondent filed his answer on 21 September 1990;

Whereas the Applicant filed written observations on 21 January 1991;

Whereas, on 23 April 1991, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Applicant and the Respondent;

Whereas, on 26 April 1991, the Applicant submitted his answer to the Tribunal's question;

Whereas, on 1 May 1991, the Respondent submitted his answers to the Tribunal's questions;

Whereas the Applicant's principal contentions are:

1. The Respondent should not have deducted $1,740 from the Applicant's final entitlements under Judgement No. 439 since the Respondent had approved the conversion of his split shipment, from Bangkok to Khartoum, from surface to air transport on a one to one basis.

2. The delays by the Respondent in implementing Judgement No. 439 constitute an obstruction of justice tantamount "to a bureaucratic war of attrition, if not harassment".

Whereas the Respondent's principal contentions are:

1. Judgement No. 439 has been implemented.

2. Delays in the implementation of Judgement No. 439 were neither due to bad faith on the part of the Administration nor a cause of any financial or moral injury to the Applicant.

3. Deduction from the Applicant's final entitlements of the amount of $1,740 was properly made in accordance with section 1207, subsection 4.4(ii), of the UNDP General Administration Manual.

The Tribunal, having deliberated from 15 to 29 May 1991, now pronounces the following judgement:

I. In his first plea, the Applicant requests the Tribunal to enforce Judgement No. 439, Van Branteghem, dated 17 May 1989, whereby the Respondent was ordered to "cease to withhold the equivalent amount from sums otherwise due to the Applicant". These sums concern the final payments upon separation of the Applicant.

II. As to the facts, the Tribunal notes that on 27 April 1990, the Respondent forwarded to the Applicant a cheque in the amount of $338.14 asserting this to be the net sum of his entitlements. He also forwarded a copy of the Applicant's final pay statement, with a note attached thereto explaining the calculations made. It appeared that an amount of $1,740 had been deducted from the Applicant's final payment as this was considered by the Respondent as "cost of shipment of personal effects in excess of entitlements".

III. According to the Respondent, the Applicant had exceeded his entitlements with regard to the transfer in 1985, of his personal effects from Vigo, Spain, his home, to Khartoum, Sudan, the place of his new assignment. The Respondent asserts that the Applicant was entitled to payment of the transfer cost of 1,155 kgs. by air from Vigo to Khartoum. On the basis of a "split shipment", which had been authorized, the Applicant had shipped 540 kgs. from Vigo to Khartoum, and 580 kgs. from Bangkok to Khartoum. As the rate for airfreight from Bangkok to Khartoum exceeded the Applicant's entitlements (which was the rate for airfreight from Vigo to Khartoum) by $3 per kg., UNDP overpaid his entitlements by 580 kgs. x $3 per kg. = $1,740. The intention to deduct that amount from the Applicant's final pay was first communicated to him by the Respondent in a letter dated 2 August 1989.

IV. In correspondence with the Respondent, the Applicant objected to that deduction and asserted that a split air transport of his personal effects (Bangkok-Khartoum and Vigo-Khartoum) had been duly authorized by the UNDP office in Bangkok at a conversion rate of one to one (sea to air) because of the hazards of surface transport to Khartoum.

V. The Respondent does not deny the existence of that authorization but interprets it in the sense that allowing the split shipment did not authorize the Applicant to exceed his transportation entitlements, and, accordingly, the airfreight rate entitlements from Vigo to Khartoum were also applicable to the split shipment from Bangkok to Khartoum, with any excess costs being payable by the Applicant.

VI. Thus, there are two contradictory interpretations concerning the 1985 authorization of the split shipment of the Applicant's personal effects from Bangkok to Khartoum.

VII. The Tribunal observes that the claim from UNDP regarding the alleged over-payment for the Applicant's shipment reached the latter on 11 September 1989, i.e., nearly four years after the shipment, and at a time when the Applicant had long since left the service of the United Nations. The

Tribunal considers that such a course of action was not appropriate and it caused unjustified delays in the payment of the Applicant's final entitlements.

VIII. In this regard, the Tribunal recalls that in its Judgement No. 410, Noll-Wagenfeld (1988), paragraph XXX, reference was made to a communication dated 30 July 1987, announcing a determination by the Under-Secretary-General for Administration and Management to review the policy regarding recovery of overpayments to staff members, and pending clarification of such policy "to limit to two years recovery of overpayments made to staff members in cases where such overpayments are due to action of [the] Administration and not of [the] recipient and to suspend recovery beyond two years". Already in 1982, the Tribunal expressed its doubt that: "Respondent should be considered free, without regard to general principles of equity, to assert claims against staff members after any lapse of time, no matter how protracted ..." (Judgement No. 124, Kahale (1968), para. I).

IX. But aside from this excessive delay, the Tribunal considers that the Respondent could not, after litigating the Applicant's final entitlements in this forum in early 1989, later raise set-offs against these entitlements which it could have asserted in the earlier litigation. To do so violates the principle of res judicata. The Respondent was bound to comply with Judgement No. 439, which precluded him from withholding amounts from the payments adjudged due to the Applicant.

X. In his second plea, the Applicant requests the Tribunal to find that the delays in implementing Judgement No. 439 constituted an obstruction of justice which has brought moral and financial disadvantages to the Applicant.

XI. Noting that the Respondent regrets the delay in implementing Judgement No. 439 of 17 May 1989, the Tribunal considers that a delay of more than two years cannot be explained by the need to recalculate the Applicant's final entitlements and justified by the extensive correspondence on that subject.

XII. The Tribunal finds that the Applicant suffered injury from a certain degree of negligence on the part of the Administration, which caused an unreasonable delay in even the partial implementation by the Respondent of Judgement No. 439, as the payment of $338.14 reached the Applicant only on 15 June 1990, i.e. more than one year after the pronouncement of the Judgement.

XIII. At the same time, the Tribunal recalls, as it did in Judgement No. 414, Apete (1988), paragraph XIV, quoting from Judgement No. 353, El-Bolkany (1985), paragraph X, that an inordinate delay "not only adversely affects the administration of justice, but on occasions can inflict unnecessary anxiety and suffering to an Applicant". This being the case, the Tribunal considers that the Applicant is entitled to an award for the delay caused by the Respondent, which the Tribunal fixes at $500.

XIV. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant, immediately, the amount of $1,740 and, as compensation for delays, $500.

XV. All other pleas are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

Geneva, 29 May 1991

Paul C. SZASZ
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/518
29 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 518

Case No. 554: BREWSTER

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas, at the request of Havelock Ronald Brewster, a staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 January and 30 June 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 6 June 1990, the Applicant filed an application containing the following pleas:

"II. Pleas

(1) The Applicant requests the Tribunal, as a preliminary measure, to call the following persons as witnesses;

...

(2) The Applicant requests the Tribunal:

(a) To find that the 'functional title' and 'level' of the post occupied by the Applicant from 15 September 1985 to 8 March 1990 was 'Director of the Commodities Division' and D-2 respectively;

(b) To order the Secretary-General of the United Nations to send to the Applicant a formal acknowledgement of the fact that a satisfactory procedure had not been followed in removing the Applicant from his post of Chief, Development and General Studies Branch, Commodities Division and assigning him as Chief, Structural Adjustment and Trade Expansion Branch, Manufactures Division;

(c) To order the Secretary-General of the United Nations in the same communication to express regret that 'a letter from the former Under-Secretary-General for Administration and Management to the then UNCTAD Officer-in-Charge, dated 25 July 1985, had been placed in the Applicant's personnel file at UNCTAD without his knowledge'.

(3) The Applicant requests the Tribunal to fix compensation in the amount of one year's salary for acute mental injury sustained over a protracted period of time, from 5 June 1985, to the present time."

Whereas the Respondent filed his answer on 21 December 1990,

Whereas the Applicant filed written observations on 28 January 1991,

Whereas, on 1 May 1991, the President of the Tribunal ruled that no oral proceedings would be held in the case,

Whereas the facts in the case are as follows:

The Applicant entered the service of UNCTAD on 1 July 1968, on a one-year fixed-term appointment as an Economic Affairs Officer at the P-3 level. He separated from the service of UNCTAD in June 1969, upon the expiration of his fixed-term appointment. On 3 June 1973, the Applicant re-entered the service of UNCTAD as an Economic Affairs Officer at the P-4 level, in the Division for Economic Cooperation among Developing Countries. On 1 February 1975, he was granted a probationary appointment and on 1 February 1976, a permanent appointment. On 5 September 1977, the Applicant was reassigned, within UNCTAD, to the Commodities Division, as an advisor to Mr. Alister McIntyre, the new Director of the Division. On 1 April 1978, he was promoted to the P-5 level and his functional title was

changed to Senior Economic Affairs Officer. On 1 April 1982, the Applicant was promoted to the D-1 level, as Chief, Development and General Studies Branch, Commodities Division.

In a memorandum dated 11 June 1985, Mr. McIntyre, then Deputy Secretary-General and Officer-in-Charge of UNCTAD, announced the "redeployment and consequential reassignment of staff members within the UNCTAD Secretariat". The Applicant was among the staff reassigned, having been informed by the UNCTAD Administration some five days prior to the issuance of the memorandum that he would be so reassigned, effective 1 July 1985, to the post of Chief, Structural Adjustment and Trade Expansion Branch, Manufactures Division.

In a cable dated 3 July 1985, the Applicant informed the Secretary-General that he would be requesting administrative review of UNCTAD's decision to reassign him. On 25 July 1985, the Applicant met with the Under-Secretary-General for Administration and Management to discuss the reassignment of staff in UNCTAD. Also on 25 July 1985, the Under-Secretary-General for Administration and Management wrote a personal and confidential letter to Mr. McIntyre, recording his account of the meeting with the Applicant; the letter was placed in the Applicant's personnel file. The Applicant set forth his version of the meeting in a memorandum dated 20 September 1985, to the Under-Secretary-General.

On 22 September 1985, the Applicant requested the Secretary-General to review the administrative decision to reassign him within UNCTAD.

The Applicant also filed a complaint with the Panel on Discrimination and Other Grievances in the UN Secretariat (Panel on Discrimination). On 5 March 1986, the Co-ordinator of the Panel on Discrimination transmitted its findings on the Applicant's case to the Assistant Secretary-General for Personnel Services. It recommended that:

> "(1) ... that UNCTAD institute 'monthly meetings' as suggested in ST/GB/206 especially if further redeployments are envisaged."
>
> and
>
> "(2) ... since the versatility of Mr. Brewster is widely recognized in UNCTAD that he be given priority for any vacant positions within his area of expertise."

Not having received a reply from the Secretary-General to his request for review, the Applicant lodged an appeal with the Joint Appeals Board (JAB) on 11 April 1986.

On 15 September 1986, the Applicant was reassigned to his former Division (the Commodities Division) with the functional title of Officer-in-Charge.

On 16 January 1987, the parties agreed to enter into a conciliation proceeding that did not result in a mutually acceptable resolution of the Applicant's complaint. Consequently, the JAB pursued its consideration of the case. The Board adopted its report on 14 July 1989. Its considerations, conclusions and recommendations read in part as follows:

"Considerations, Conclusions and Recommendations

Receivability

32. The Panel first considered the issue of receivability and found that the appeal was receivable pursuant to staff rule 111.2.

Merits

...

39. Since the developments which occurred after 11 June 1985, date of the administrative decision contested by the Appellant, have not led to a solution to the case, the Panel has decided to concentrate on the principal issues identified in the appeal and which relate to the procedure adopted by UNCTAD in 1985 in the implementation of a major redeployment exercise which affected 39 staff members. The Panel is fully cognizant of the Secretary-General's right under staff regulation 1.2 to reassign staff within the Organization as necessary. It also believes, however, that proper personnel management procedures need to be observed. The Panel has reviewed very carefully the correspondence submitted by the Appellant and by the Respondent and has reached the conclusion that a satisfactory procedure was not followed in the reassignment of the Appellant in 1985. The Panel regrets that guidelines such as those contained in the Secretary-General's Bulletin ST/SGB/206 of 5 October 1984 and more particularly in its para. 4(c) were not taken into account.

40. The Panel, having identified the principal issue in this case, then addressed the claims of the Appellant which can be summarized as follows:

(a) To be appointed as a matter of priority to a position within his area of interest and expertise,

(b) to receive just compensation for fault of procedure and mental injury endured since June 1985, and

(c) to be reimbursed for legal costs.

41. In considering the claims of the Appellant, the Panel wishes to underline the fact that the notification of appealwas submitted to JAB on 24 December 1985, that more than 3 years have elapsed since then and nearly 4 years since the contested administrative decision was taken. The Panel is of the opinion that the delay may have occurred because the parties would have wished to reach a satisfactory solution of the case through conciliation. The Panel was entrusted with the case in September 1988 and its members were unanimously of the opinion that a conciliation had to be possible since:

(a) The personnel record of the Appellant is exemplary and shows that he has consistently discharged his functions in an outstanding way;

(b) The report of the Panel on Discrimination and Other Grievances recommended that he be given priority for any vacant positions within his area of expertise;

(c) The Secretary-General of UNCTAD indeed considered him for such a position and entrusted him with the direction of the Commodities Division on 15 September 1986.

42. The first claim of the Appellant has been partly met with his reassignment to the Commodities Division. The Panel, however, recommends that the UNCTAD Administration review immediately the terms of such assignment in relation to: (a) the functional title, and (b) the level of the post.

43. The Panel further recommends that, in relation to the second claim of the Appellant for compensation due to the non-observance of the consultation process outlined in para. 4(c) of ST/SGB/206, a formal acknowledgement of the fact that a satisfactory procedure had not been followed be addressed to him. The same communication should express regrets that a letter from the former USG [Under-Secretary-General] for Administration and Management to the then UNCTAD Officer-in-Charge, dated 25 July 1985, had been placed in his personnel file at UNCTAD without his

knowledge. The Panel deplores the existence of such 'personnel files' at UNCTAD, separate from the official ones, and points out that it is not in keeping with the terms of Circular IC/Geneva/3013 of 10 May 1983.

44. Finally, the Panel does not consider applicable the third request of the Appellant for reimbursement of legal costs."

On 21 November 1989, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's report and informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the contested decision on the following grounds:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the decision to reassign you effective 1 July 1985, from the post of Chief, Development and General Studies Branch, Commodities Division, at the D-1 level, to that of Chief, Structural Adjustment and Trade Expansion Branch, Manufactures Division, at the same level, which occurred as part of an overall 1985 redeployment exercise. In this connection, it should be noted that the Secretary-General has a discretionary authority to reassign his staff to any of the activities or offices of the United Nations, in the interest of good administration. Furthermore, your reassignment took place after appropriate consultations with you in this regard on 5 and 6 June 1985, concerning such reassignment. You were also advised when the general redeployment was communicated to staff members on 11 June 1985, that any changes which did not develop positively would be reviewed in due course, with the affected staff.

The Secretary-General has also noted the Board's conclusion in paragraph 42 of its report. In this connection, your assignment to the Commodities Division as Officer-in-Charge, Office of the Director, effective 15 September 1986, against post no. E-D1-009-371 was consequent to the arrangements communicated to the staff by the UNCTAD Secretary-General on 3 September 1986, confirmed to you on 10 September 1986. With regard to the Board's observations in paragraph 43 of its report, it is regretted that a letter was placed in your personnel file without your prior knowledge. The necessary instructions are being given to UNCTAD to avoid the possibility of similar events in the future."

On 6 June 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's "functional title" from 15 September 1985 to 8 March 1990, was "Director of the Commodities Division". The post he encumbered was at the D-2 level.

2. The Respondent should acknowledge that he did not follow satisfactory procedures in removing the Applicant from one post and assigning him to another.

3. The Respondent should formally express regret that a letter of 25 July 1985, from the Under-Secretary-General for Administration and Management to the then UNCTAD Officer-in-Charge, was placed in the Applicant's personnel file without his knowledge.

Whereas the Respondent's principal contention is:

The Respondent's decision to reassign the Applicant was a lawful exercise of the Respondent's discretionary authority under the Staff Regulations; it was not taken in violation of applicable decentralized staff management consultative procedures.

The Tribunal, having deliberated from 6 to 29 May 1991, now pronounces the following judgement:

I. Item (1) of the Applicant's pleas is the request that, as a preliminary measure, eleven named persons should be called by the Tribunal as witnesses. The President of the Tribunal ruled on 1 May 1991, that no oral proceedings would be held in this case. The Tribunal notes that the documentation is sufficient to enable this case to be decided without examination of witnesses.

II. Item (2) of the Applicant's pleas deals with matters of substance, sub-paragraph (a) requesting the Tribunal:

> "To find that the 'functional title' and 'level' of the post occupied by the Applicant from 15 September 1985 to 8 March 1990 were 'Director of the Commodities Division' and D-2 respectively".

The Tribunal notes that these matters were not formally submitted to the JAB and that the Respondent has therefore objected to their consideration by the Tribunal.

III. The substance of item 2(a) is, in any event, a matter solely within the discretion of the Respondent under staff regulation 1.2, and the Tribunal cannot substitute its own opinion for the decision of the Respondent, in the absence of some impropriety or irregularity proved by the Applicant.

IV. The Tribunal, however, observes with surprise that the Applicant remained as "Officer-in-Charge" (a title normally of temporary duration) at the D-1 level for a period of three-and-a-half years.

V. The gravamen of the Applicant's complaint is that he was moved to another post as part of a restructuring within UNCTAD which involved the movement of 39 senior officials. He asserts that this was done without the required consultation with the staff, a requirement which, according to the Applicant, rests upon two Bulletins issued by the Secretary-General to members of the staff of the United Nations, numbered respectively ST/SGB/172 (19 April 1979) and ST/SGB/206 (5 October 1984).

VI. The Applicant's assertion that his change of post was not accompanied by the required consultation is, however, denied by the Respondent, who claims that "discussions were in fact held with Applicant concerning his reassignment". The Applicant states in his application that on 5 June 1985, he was called to the office of the Deputy Secretary-General of UNCTAD in the presence of the Chief of Personnel of UNCTAD and informed that the Officer-in-Charge of UNCTAD had decided to transfer the Applicant to a new post with unspecified duties. On 6 June 1985, according to the Applicant, he was called to the office of the Officer-in-Charge of UNCTAD who, in the presence of the Chief of Administration of UNCTAD, repeated his decision "in an aggressive manner". On 7 June 1985, the Staff Coordinating Council requested the intervention of the Secretary-General's Office and the Office of Personnel Services at Headquarters and on 12 June 1985, the Officer-in-Charge of UNCTAD agreed to the Council's request to meet with him on the matter of the reassignments, which he had announced the previous day in a circular to all staff members. On 13 June 1985, the Executive Bureau of the Staff Coordinating Committee cabled the Respondent reporting, as the result of the meeting with the Officer-in-Charge, that there had been

"serious anomalies have resulted from his rather precipitate reassignment of staff, ... violation of established procedure and absence of consideration of career prospects and interests of the staff concerned ...". Following a further meeting with the Officer-in-Charge on 20 June 1985, the Executive Bureau of the Staff Coordinating Committee sent a cable, in terms similar to the previous cable to the UN Secretary-General, but addressed to the Under-Secretary-General for Administration and Management. At his request, the Applicant met the Under-Secretary-General at Headquarters in New York, in connection with the Applicant's transfer from his post.

VII. The question, therefore, arises whether the totality of the proceedings described in the previous paragraph amounted to the consultation required by ST/SGB/172 and ST/SGB/206, referred to in paragraph V. There is, so far as the Tribunal is aware, no definition in the Staff Regulations or Rules, or in the Tribunal's jurisprudence, of the concept of consultation, but on an ordinary construction, it would appear that the essential element is that each party to the consultation must have the opportunity to make the other party aware of its views, so that they can be taken into account in good faith. In a study prepared by the United Nations Secretariat (Juridical Yearbook, 1962 (prov.), fascile 2, page 279) it is stated that "consultation is a process by which the views of the parties consulted are merely sought or ascertained ...". This construction does not mean that the views of either party must necessarily prevail or that one side or the other must change its position.

VIII. Having examined the evidence, the Tribunal has reached the conclusion that the proceedings described in paragraph VI amounted to the required consultation, though the outcome was unsatisfactory to the Applicant. His objection was, in fact, to the outcome of the proceedings, rather than to the proceedings themselves, which in fact afforded the Applicant and the Staff Association adequate opportunity to express their views and to press them upon senior officers personally.

IX. It is true that paragraph 4(a) of ST/SGB/206, referred to in paragraphs V and VII, provides as follows:

> "The issue or policy should affect the entire department or office or at least a significant number of staff in a particular unit or service of the department or office. Individual cases as such should not normally be subject to consultation" (emphasis added).

However, from Judgement No. 136, Detière (1970), it appears that, the Respondent must pay due regard to the interest of the individual staff member, the Tribunal having indicated that, while recognizing the importance for the proper functioning of an organization (ICAO) of the right to transfer staff, it must be emphasized that in exercising that prerogative it is necessary to ascertain that the positions before and after the transfer were comparable and due regard is paid to the personal interest of the staff member concerned.

In a memorandum of 29 November 1983, addressed to all Directors and Chiefs of Programmes, the Chief of Personnel, Administrative Service, UNCTAD, drew attention to the foregoing obligation, as established by the jurisprudence of the Tribunal. In the present case, the Tribunal is satisfied that, in the proceedings described in paragraph VI, the Respondent's attention was fully drawn to this obligation, to which the Respondent did not fail to give effect.

X. Though not stated in the application, later documentation (based on a newspaper report) suggests that the decision to change the posts of 39 officials was improperly motivated by the political wishes of certain States. There is, however, no evidence to support this allegation of impropriety, and the Tribunal does not take it into account.

XI. The Applicant also put forward for consideration by the Panel on Discrimination and Other Grievances the suggestion that his removal to a new post amounted to discrimination against him personally. The Panel rejected this complaint and observed there was a direct conflict between the interests of the Applicant and the Organization.

XII. The Tribunal, for the foregoing reasons, rejects the request in paragraph (2)(b) of the Applicant's pleas for "a formal acknowledgment of the fact that a satisfactory procedure had not been followed" in moving the Applicant to a new post.

XIII. Item (2)(c) of the Applicant's pleas requests the Tribunal to order the Respondent to "express regret that 'a letter from the former Under-Secretary-General for Administration and Management to the then UNCTAD Officer-in-Charge, dated 25 July 1985, had been placed in the Applicant's personnel file at UNCTAD without his knowledge'". The Tribunal notes that regret was in fact expressed in a letter of 21 November 1989, written to the Applicant by the Acting Under-Secretary-General for Administration and Management.

XIV. In his plea (3) the Applicant requests the Tribunal to "fix compensation in the amount of one year's salary for acute mental injury sustained over a protracted period of time, from 5 June 1985, to the present time". The Applicant has not produced evidence that he has suffered the acute mental injury which he claims. The Tribunal therefore does not award him any compensation.

XV. The Tribunal has, after consideration, decided not to award a sum in respect of the Applicant's legal costs. It is not the practice of the Tribunal to award legal costs to an unsuccessful Applicant in the absence of special circumstances.

XVI. For the foregoing reasons, all pleas are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

Geneva, 29 May 1991

Paul C. SZASZ
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/519
29 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 519

Case No. 533: KOFI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas at the request of Tetteh Kofi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 9 February, 30 June and 14 November 1988, the time-limit for the filing of an application to the Tribunal;

Whereas at the request of the Applicant and with the agreement of the Respondent, the Tribunal suspended, under article 7, paragraph 5 of its Statute, the time-limit for the filing of an application to the Tribunal until 12 September 1989;

Whereas, on 25 September 1989, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 December 1989, the Applicant, after making the necessary corrections, again filed an application, containing pleas that read in relevant part as follows:

"II. PLEAS

1. With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal:

(a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;

(b) To find that the present application is receivable under article 7 of its Statute.

2. On the merits, the Applicant respectfully requests the Tribunal:

(a) To find that a legal relationship existed between Appellant and the Respondent based on the contractual obligation which resulted from the offer made by the Director of IDEP [African Institute for Economic Development and Planning] on 13 September 1983 ...

(b) To find that the questions raised in Appellant's letter of acceptance regarding a suggested better starting date, the level of the post and the salary did not operate to defeat his acceptance because they did not materially alter the offer. ...

(c) To find that the ECA [Economic Commission for Africa]/IDEP Director breached his obligation when he failed to send a letter of appointment and all the necessary documents procedurally required by the UN for recruitment of staff, or to send to the Appellant a notice of rescission of the contract after receiving his cable and letter of acceptance. As a result of Respondent's inaction and failure to follow proper recruitment procedure, the Appellant suffered pecuniary losses in the amount of at least $72,852 including some incidental and consequential damages (...). The Tribunal may award this compensation.

(d) To examine the evidence which is available and to find that the reason for the breach is that the position which the Appellant and Respondent had contracted for was encumbered by a former employee, who at that time, together with others, were contesting their termination before the United Nations [Discrimination and Other] Grievances Panel and the Joint Appeals Board (...).

(e) To find that the fixed-term contract (...) under which the Appellant joined IDEP was not renewed due to bad faith. To award a lump sum of money in compensation of two years salary for moral and material injury caused to the Appellant when Respondent terminated him before the expiration of his fixed-term appointment or to order the rescission of the decision to terminate the

Applicant and his reinstatement as a staff member of IDEP, as well as the payment of compensation for injury sustained.

(f) To fix the appropriate amount of compensation, after negotiations with Appellant's counsel, for actual, consequential, and moral damages suffered in respect of this claim (...)."

Whereas the Respondent filed his answer on 30 August 1990;

Whereas the Applicant filed written observations on 30 April 1991, in which he amended his pleas as follows;

"...

2. (g) to fix the amount of compensation for actual, consequential and moral damages to the equivalent of two years net base pay together with interest from the period March 1986 to the present.

(h) to hold oral proceedings on the case to hear the Applicant and his counsel in order to clarify a number of issues that have arisen in the course of the Joint Appeals Board's deliberations and Respondent's answer.

(i) to award costs to the Applicant in the amount of $1000.00."

Whereas, on 1 May 1991, the presiding member of the panel ruled that no oral proceedings will be held in the case;

Whereas the facts in the case are as follows;

In a cable dated 13 September 1983, the Director of the African Institute for Economic Development and Planning (IDEP), in Dakar, Senegal, a subsidiary body of the Economic Commission for Africa (ECA), informed the Applicant, on behalf of the Chairman of the Governing Council of IDEP, that he had been selected for a one-year teaching post at IDEP, at grade L-4, step 4, under the 200 Series of the UN Staff Regulations and Rules. The cable included information concerning salary and other emoluments and stated that the offer was conditional upon a successful medical examination. The Applicant was asked to reply whether the "OFFER [WAS] ACCEPTABLE" and to expedite all necessary arrangements in order to enter the service of IDEP by 15 October 1983, since the academic year was scheduled to commence on 1 November 1983.

In a letter dated 16 September 1983, the Applicant accepted the offer but stated that it would not be possible for him to come in November. He added: "I hope that you will be able to adjust your programme so that I can come at a later date". He also raised questions concerning the salary and the level of the appointment offered and stated that they could be "solved through further communication".

On 20 September 1983, the Applicant sent a cable reading as follows: "PLEASED TO ACCEPT OFFER HOPE WE CAN ARRANGE LATER STARTING DATE DUE TO PRIOR TEACHING COMMITMENT HERE LETTER FOLLOWS".

On 28 September 1983, the Applicant wrote to the Chief, Personnel Section, ECA, referring to the offer he had received and expressing the hope that the grade level offered, as well as the timing of the assumption of his duties could be negotiated. The Applicant sought the Chief of Personnel's advice and help for the resolution of these problems. The Applicant received no response to his communications of 16, 20 and 28 September 1983.

On 5 December 1983, the Applicant wrote to the Director, IDEP, stating that he was committed to coming to IDEP as soon as possible. He also expressed the hope that the Director would be patient so that "the timing problem" could be worked out. He added: "I will be waiting for your call so we can make arrangements for me to come for the month of January and then to start formally in June ...". In a further letter dated 4 February 1984, the Applicant asked the Chief, Personnel Section, ECA, if they could "negotiate the starting grade for the IDEP job".

The Applicant met with the Director of IDEP in New York in early 1984. In a letter of 26 April 1984, the Applicant again asked that his grade and step be changed.

In a letter dated 3 May 1984, the Director of IDEP informed the Applicant that the level of the offer at which he could join the Institute had been "dictated by available post and budget allocations to it". He stated there was nothing he could do to change the offer, except wait until the Applicant arrived at the Institute, when, "after having been integrated in [IDEP's] programmes and community" he could request a reclassification of the post in light of the Applicant's "acquired professorial rank".

On 15 June 1984, the Chief, Personnel Section, ECA, informed the Applicant that the post available at IDEP had been established at the L-4 level and could not be upgraded. He described other allowances that the Applicant would receive under the Staff Regulations and Rules.

In a cable dated 3 August 1984, the Applicant notified IDEP that he was "COMMITTED TO COME ... IN OCTOBER ... IN ACCORDANCE WITH THE TERMS OF THE ORIGINAL CONTRACT CABLED TO [HIM] LAST OCTOBER AND SUBSEQUENT DISCUSSIONS IN NEW YORK LAST MONTH AND IN DAKAR THIS MONTH". He was prepared to start in September. He sought confirmation of "ARRANGEMENTS AS PREVIOUSLY AGREED". He requested, and on 17 August 1984, the Dean of the University of San Francisco approved, an unpaid leave of absence for the academic year 1984-1985. In a further cable dated 20 August 1984, the Applicant stated that he was "READY TO START TEACHING IDEP IN SEPTEMBER".

On 29 August 1984, the Applicant wrote to the Chief, Personnel Section, ECA, stating that, in his view, the earlier offer was still in effect and that he had requested leave of absence from his University in order to come to IDEP. As he had started preparing for his classes, he was "assuming that remuneration for [his] services [would] begin in September". In a cable dated 22 September 1984, the Applicant informed the Chief, Personnel Section, ECA, that he was "READY TO HONOUR IDEP TEACHING CONTRACT" and "FAILED TO UNDERSTAND HOLDUP".

Having received no reply, in a cable dated 11 October 1984, the Applicant requested the Chairman of the IDEP Governing Council to help him resolve the problem of his employment, stating that the Governing Council contract with him was still in effect. On the same date, he sought the assistance of the Executive Secretary, ECA, and summarized in a cable his account of the discussions held with the Director of the Institute since February 1984.

On 18 October 1984, the Applicant wrote to the Personnel Officer for IDEP, and referring to a telephone conversation held the previous month in which the latter had indicated that the contract with the Applicant "had been abrogated", the Applicant set forth his views and position concerning his contractual situation and his understanding that the contract could only be abrogated by the Governing Council.

In a cable dated 12 November 1984, the Director of IDEP informed the Applicant that since he had not been able to comply with the conditions of the offer made to him in September 1983, the post offered to him had been occupied by another, and consequently the offer had expired. In a reply dated 15 November 1984, the Applicant expressed shock on learning that his contract had been abrogated. On the same date, the Applicant asked the

Executive Secretary, ECA, to intercede with the Director of IDEP in order that the latter might reconsider his decision. He stated that "BECAUSE OF AGREEMENT WITH MONTASSER IN JANUARY 1984 AND SUBSEQUENT CORRESPONDENCE I TOOK LEAVE OF ABSENCE WITHOUT PAY" and argued that the Organization could be liable for $60,000 representing gross salary, pension fund, life insurance and health insurance contributions which he had lost when taking a leave of absence from his University.

A further exchange of correspondence ensued between the Applicant and the ECA Administration concerning the decision by the Director of IDEP to withdraw his offer. Finally, on 16 January 1985, the Chief, Personnel Section, ECA, cabled the Applicant an offer of employment as follows:

> "ON BEHALF OF THE CHAIRMAN OF IDEP GOVERNING COUNCIL AM PLEASED TO RENEW UNDER THE 200 SERIES OF THE UNITED NATIONS STAFF RULES OFFER ALREADY MADE TO YOU IN 1983 FOR THE POST OF PROFESSOR AT IDEP FOR ONE YEAR BEGINNING AT THE LATEST END FEBRUARY 1985 SUBJECT TO SATISFACTORY MEDICAL CLEARANCE. OFFER IS AT THE SAME LEVEL GIVEN TO YOU IN OUR PREVIOUS CORRESPONDENCE. AM INSTRUCTED HOWEVER INFORM YOU THAT GOVERNING COUNCIL AFTER EXAMINING YOUR OTHER CLAIMS DECIDED NOT REPEAT NOT ACCEPT ANY OF THE CLAIMS THAT IS THE PAYMENT OF DSA IN NEW YORK, NOR PAYMENT OF SALARY FROM AUGUST 1984 NOR HOST OF TELEPHONE CALLS ETC. BEING MADE BY YOU. GOVERNING COUNCIL ALSO DECIDED THAT UNLESS YOU ACCEPT THIS OFFER AND ASSUME DUTY BY 28 FEBRUARY 85 OFFER WILL BE CONSIDERED AS WITHDRAWN WITHOUT ANY OBLIGATION ON THE PART OF IDEP TO YOU".

On 1 April 1985, the Applicant entered the service of IDEP, on a one-year fixed-term appointment, which was extended for a further period of almost four months. The Applicant separated from the service of IDEP on 22 July 1986.

On 13 March 1985, the Applicant had requested the Secretary-General to review the decision by IDEP not to reimburse him for damages resulting from the alleged breach of contract by the IDEP Administration. Not having received any reply from the Secretary-General, the Applicant, on 7 August 1985, lodged an appeal before the Joint Appeals Board (JAB). The Board adopted its report on 27 April 1987. Its considerations, conclusions and recommendation read as follows:

"Considerations

28. The Panel observed that the appellant's complaint was the result of exchanges of cables, correspondence, telephone calls and an occasional discussion that took place between the appellant and senior officials of IDEP and ECA before he assumed his duties with IDEP in Dakar on 1 April 1985.

29. The Panel examined carefully the chronology of these exchanges, which started with an offer made by the Director of IDEP on 13 September 1983, requesting the appellant, subject to a successful medical examination, to report on 15 October 1983 for work at the L-4 level.

30. The Panel noted that the appellant did not undergo a medical examination, did not report for duty on 15 October 1983 and that he raised questions about the level of the post and the salary, which he sought to renegotiate.

31. The Panel also noted that subsequently by letter of 3 May 1984, the Director of IDEP again offered the appellant a post at the same level as that proposed before but again reservations were made by the appellant. The Panel further noted that it was only on 15 February 1985, that the appellant accepted the terms offered and signed a contract with IDEP.

32. On the basis of the evidence at its disposal and taking into account the events that took place during the period 13 September 1983 - 14 February 1985, the Panel could only conclude that there was no contract during that period and therefore that there could not be a 'breach of contract'. The Panel also agreed that there existed no commitment on the part of the Organization to employ the appellant nor was there any legal expectancy of employment for the period mentioned above. The Panel could not find any evidence of a legal relationship between the appellant and the Organization.

33. During its examination of this appeal the Panel reviewed carefully Administrative Tribunal Judgements which dealt with similar, but not identical cases, namely, Judgements Nos. 96, 106 and 115.

34. On the basis of its analysis of these cases, the Panel considered that it was not competent to review the present case.

35. The Panel then addressed itself to the statement of damages which the counsel for the appellant submitted on 14 April 1987. It noted that the appellant in that

statement had referred to 'the breach of the February 1985 contract', the 'non-payment for March 1985' and ... 'the July 1985 salary issue'.

36. In the Panel's view, the appellant has introduced new, extraneous elements in his appeal, and, in effect, the appellant has sought to expand the scope of the original appeal. The appeal of 7 August 1985, referred to a specific grievance against a decision taken by the Governing Council of IDEP concerning events that took place before he signed his contract on 15 February 1985. The Panel considered that it could not go beyond the appeal of 7 August 1985.

37. Finally, the Panel wished to express its belief that the many telephone calls, cables, discussions and correspondence exchanged between various senior officials and the appellant had contributed to the appellant's 'raised expectations'. More firmness, more frankness, more finesse and more finality by IDEP might have prevented the appellant's grievances.

Conclusions and Recommendation

38. The Panel concluded that in the absence of any legal relationship between the Organization and the appellant before he signed the acceptance of the offer of employment on 15 February 1985, it was not competent to consider this appeal.

39. Therefore the Panel makes no recommendation on this appeal."

On 9 June 1987, the Assistant Secretary-General for Human Resources Management informed the Applicant that: "The Secretary-General has taken note of the Board's unanimous decision not to entertain your appeal because you had not been appointed to any post in the Organization until well after the events to which this appeal relates."

On 27 December 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. A legal relationship existed between the Applicant and the Respondent as a result of the Applicant's acceptance on 16 and 20 September 1983, of the offer made by the Director of IDEP on 13 September 1983.

2. The fixed-term appointment under which the Applicant joined IDEP on 1 April 1985, was not renewed because of bad faith.

Whereas the Respondent's principal contentions are:

1. The appeal against the non-renewal of the Applicant's fixed-term appointment is not receivable because it had not been included in his original appeal to the JAB.

2. The Applicant's claims for costs incurred prior to his appointment were waived by his acceptance of IDEP's offer of appointment.

The Tribunal, having deliberated from 8 to 29 May 1991, now pronounces the following judgement:

I. The Applicant appeals against the Respondent principally on two claims:

(a) The decision of the Respondent not to compensate the Applicant for the pecuniary losses he allegedly suffered and expenses he allegedly incurred prior to his signing a contract with IDEP on 15 February 1985;

(b) The decision concerning the non-renewal of his fixed-term appointment which expired on 22 July 1986.

II. The Applicant has asked for oral hearings. The Tribunal notes that adequate and sufficient material is available to enable the case to be determined without oral proceedings and, therefore, rejects this plea.

III. The Tribunal will deal first with the Applicant's appeal against the decision of the Respondent not to compensate him for the alleged pecuniary losses arising from events which took place before he signed his contract with IDEP on 15 February 1985. The Applicant contends that a legal relationship existed between himself and the United Nations based on an alleged contract which resulted from the offer made by the Director of IDEP on 13 September 1983. The Applicant asserts that he accepted this offer on 16 and 20 September 1983. He claims that a valid contract came into existence when he exercised his power of acceptance of an open offer of employment and when he relied upon such offer to his detriment. The Applicant also contends that such an offer cannot be unilaterally withdrawn prior to the signing of a letter of appointment.

IV. To support his contentions, the Applicant has advanced a number of arguments. In his view, an offer creates a power of acceptance, which, if exercised within a reasonable time, operates to form a contract even though the acceptance states terms additional to or different from those offered or agreed upon, unless the acceptance is expressly made conditional on the offeror's assent to the additional or different terms. Hence, he concludes that a contract was formed and that the Respondent breached that contract by failing to follow the post-contract recruitment formalities, including the sending of a letter of appointment.

V. The Tribunal cannot concur with this conclusion. It observes that the offer made to the Applicant by the Director of IDEP on 13 September 1983, contained two specific conditions: that the Applicant undergo a medical examination and that he report for duty in Dakar on 15 October 1983, for work at the L-4 level. The Tribunal notes that neither of these conditions was fulfilled. The Applicant did not undergo a medical examination and did not report for duty on 15 October 1983. Instead he raised questions and objections regarding the level of the post, the salary and the starting date for his assumption of duties. He sought to renegotiate these fundamental matters from the very beginning of his correspondence with IDEP. The first reaction of the Applicant to the offer made to him on 13 September 1983, is significant in this regard. Instead of answering by cable, as specifically requested, whether the "OFFER [WAS] ACCEPTABLE", the Applicant replied by letter, on 16 September 1983, that it was not possible for him to go to Dakar at the date indicated in the offer and stated: "I hope that you will be able to adjust your programme so that I can come at a later date". In the same letter he also raised questions concerning the salary and the level of appointment offered and emphasized that they could be "solved through further communication". Although on 20 September 1983, he did send a cable purporting to accept the offer, he again appealed for a different starting date and, not receiving a reply, he made no arrangements for a medical examination or for travel to his duty station.

VI. The Tribunal also observes that, by letter of 3 May 1984, the Director of IDEP again offered the Applicant a post at the same level as

that proposed in 1983, but again reservations were expressed by the Applicant. It was only on 15 February 1985, that the Applicant accepted without reservations the offer made to him on 16 January 1985 and signed a contract with IDEP.

VII. In the light of the above, on the basis of the evidence at its disposal and taking into account the events which took place during the period between 13 September 1983 and 14 February 1985, the Tribunal concludes that no contract existed during that period between the Applicant and the United Nations. The Tribunal cannot accept the view of the Applicant that one can simultaneously accept an offer while making it clear that a modification will have to be made in the date for commencement of his professional teaching duties. That date was plainly of the essence for an academic institution such as IDEP, and the offer did not invite further negotiations with respect to it, or to the level of the post, or to the expected salary. When an offeree acts as the Applicant did, his behaviour indicates that a counter-offer is being made or contemplated and, therefore, no legal basis exists for finding that a contract was formed between the Applicant and IDEP.

VIII. In the absence of a contract between the Applicant and IDEP, there could be no breach of contract. Moreover, the evidence shows that no legal commitment existed on the part of IDEP to employ the Applicant, nor was there any legal expectancy of employment for the period 13 September 1983 - 14 February 1985. Thus the Applicant had no reasonable basis, as he claims, for acting to his detriment in reliance on the course of conduct between himself and the Respondent. In fact, during that period, the Tribunal could not identify any legal relationship between the Applicant and IDEP. Therefore, the latter had no obligation to send the Applicant a letter of appointment at that time.

IX. Accordingly, the Tribunal finds that the Applicant is not entitled to be granted the compensation requested by him for the period prior to 15 February 1985.

X. Notwithstanding the foregoing, the Tribunal has examined the totality of circumstances surrounding the events prior to 15 February 1985 and has noted that the behaviour of IDEP and ECA in the present case is susceptible to criticism. The Tribunal concurs with the Joint Appeals Board's (JAB) finding that the many telephone calls, cables, discussions and correspondence exchanged between various senior officials and the Applicant had contributed to the Applicant's mistaken belief that he was entitled to a letter of appointment. The Tribunal suggests, as did the JAB, that more firmness, more frankness, more finesse and more finality might have prevented the Applicant's grievances and would have helped to avoid any confusion or misunderstanding.

XI. While recognizing that the Applicant might have suffered pecuniary losses during the period of his unemployment, the Tribunal does not find any legal responsibility on the part of the Respondent. In this respect, the Tribunal considers that in the absence of a legal relationship between the Applicant and IDEP, the steps taken by the Applicant to change his occupational status and to incur other expenses were at his own risk.

XII. With regard to the Applicant's second claim concerning the non-renewal of his fixed-term appointment which expired on 27 July 1986, the Tribunal observes that the substance of the appeal against the decision of the Respondent not to renew his contract was not considered by the JAB, because that appeal had never been properly submitted, first to the Respondent and then to the Board. The Tribunal therefore finds that this claim is not receivable under article 7 of its Statute because it has not been considered by a joint appeals body, nor has the Respondent agreed to its direct submission to the Tribunal.

XIII. However, the Tribunal notes that the Applicant was employed on a fixed-term appointment. According to staff rule 204.3(d): "A temporary appointment does not carry any expectancy of renewal". Without entering into the merits of the claim, which is not properly before the Tribunal, it may also be noted that there appears to be no evidence of malice or bad faith in the decision not to renew the Applicant's fixed-term appointment beyond 22 July 1986.

XIV. In his written observations on the Respondent's answer, the Applicant has amended the pleas and has introduced a new request to the Tribunal: that he should be awarded costs in the amount of $1,000.

XV. The Tribunal, having rejected the substantive claims, finds there are no grounds, in the absence of special circumstances, for ordering the Respondent to pay costs.

XVI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

Geneva, 29 May 1991

Paul C. SZASZ
Acting Executive Secretary